Supreme Court, U.S.
FILED

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981609 APR 6 - 1999

No. _____

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In The

Supreme Court of the United States

October Term, 1998

EDWARD WEEKLY,

Petitioner,

v.

CAJUN BAG COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Office Of Workers' Compensation

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1). Whether 42 U.S.C. § 1306(a) preempts state law concerning "[d]isclosure of information in possession of [the] Social Security Administration"; and, if so,

(2). Whether a state workers' compensation hearing officer may, consistent with the Supremacy Clause, 42 U.S.C. § 1306(a), 5 U.S.C. § 552a (the Privacy Act of 1974), and pertinent social security regulations, order an injured worker to sign an authorization directed to the Social Security Administration to disclose all of its records to the injured worker's employer, including:

Earnings records

Claim file

Other personal information

PARTIES TO THE PROCEEDING

The parties to the workers' compensation proceeding currently pending before the Louisiana Office of Workers' Compensation whose hearing officer rendered the order sought to be reviewed are:

Edward Weekly, Petitioner

Cajun Bag Company, Respondent

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CITATIONS OF OPINIONS AND ORDERS

The challenged order[1] issued by the state workers' compensation hearing officer in that certain workers' compensation proceeding entitled *"Edward Weekly v. Cajun Bag Company"*, Docket Number 97-08278, currently pending before the Louisiana Office of Workers' Compensation – District 04, and her written Reasons for Ruling,[2] the decision of the Honorable Court of Appeal, Third Circuit, State of Louisiana, entered in *Weekly v. Cajun Bag Company*, Docket Number 98-1518 (La. App. 3 Cir. 10/12/98) (finding no error in the issuance of the challenged order)[3] and the decision of the Honorable Supreme Court of Louisiana entered in *Weekly v. Cajun Bag Company*, Docket Number 98-CC-2795 (La. 1/8/99) (denying discretionary review of the challenged order)[4] are not published in any official or unofficial reporter.

STATEMENT OF THE BASIS FOR JURISDICTION

On January 8, 1999, the Supreme Court of Louisiana, the state court of last resort in Louisiana, entered an order denying discretionary review of the state workers' compensation hearing officer's challenged order, which is

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[1] See Order Compelling Discovery annexed hereto at App. 1-App. 2.

[2] See written Reasons for Ruling annexed hereto at App. 3-App. 4.

[3] See Decision of the Court of Appeal, Third Circuit, State of Louisiana, annexed hereto at App. 5-App. 6.

[4] See Order of the Honorable Supreme Court of Louisiana denying discretionary review annexed hereto at App. 7.

based on a judicial interpretation of LSA-C.C.P. Art. 1461 that is repugnant to the Constitution or laws of the United States and which violates certain rights and privileges claimed by Petitioner under the statutes and regulations of the United States. Consequently, this Court now has jurisdiction to review the state workers' compensation hearing officer's challenged order under 28 U.S.C. § 1257(a), which effectuates its appellate jurisdiction granted by U.S.C. Const. Art. III, Section 2, cls. 1 and 2. Under 28 U.S.C. § 2101(c) and Rule 13(1) of this Court's Rules, Petitioner has ninety days after entry of the order of the Supreme Court of Louisiana denying discretionary review of the challenged order, or until April 8, 1999, to file this Petition for a Writ of Certiorari, which has been timely filed.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The pertinent constitutional provision involved in this case is U.S.C. Const. Art. VI, cl. 2.

The pertinent statutes involved in this case are: 42 U.S.C. § 1306(a); 5 U.S.C. § 552(b)(3) and (b)(6); and, 5 U.S.C. § 552a(b) and 552a(b)(11).

The pertinent regulations involved in this case are: 20 C.F.R. § 401.100(a); 20 C.F.R. § 401.115; 20 C.F.R. § 401.80; 45 C.F.R. § 2.5; 45 C.F.R. § 5.3; 45 C.F.R. § 5.64; 45 C.F.R. § 5.67(a) and (c); and, 45 C.F.R. § 5b.9(a)(1) and (b)(2) and (11).

The aforementioned constitutional provision, and statutes and regulations, are reproduced in the Appendix at App. 78-App. 86.

STATEMENT OF THE CASE

On December 12, 1997, Petitioner filed a Disputed Claim for Compensation, instituting a workers' compensation proceeding against Respondent. In his Disputed Claim for Compensation, Petitioner alleged that he was injured on June 11, 1996, in a work-related accident, when a forklift he was operating collided with another forklift on Respondent's premises. Petitioner further alleged that he sustained severe injuries in this collision as his knees were smashed against the dashboard of the forklift he was operating. Petitioner described the bona-fide dispute underlying his Disputed Claim for Compensation as Respondent's failure to authorize or otherwise pay for certain medications prescribed by his treating physicians and Respondent's failure to authorize or otherwise pay for surgical treatment recommended by said physicians.

On February 16, 1998, utilizing a discovery request purportedly authorized by LSA-C.C.P. Arts. 1461, Respondent served Petitioner with a Request for Production of Documents, which discovery request was accompanied by, among other things, a certain consent form Respondent wanted Petitioner to sign.[5] This consent

[5] See Respondent's Request for Production of Documents with accompanying consent form annexed hereto at App. 8-App. 10.

form, if signed by Petitioner, would ostensibly provide the Social Security Administration with Petitioner's consent in writing to disclose his entire record maintained by said federal agency to the law firm representing Respondent in the workers' compensation proceeding, Juge, Napolitano, Leyva, Guilbeau & Ruli. On February 27, 1998, Petitioner served Respondent with Objections to Respondent's Written Discovery wherein Petitioner objected to Respondent's request that he sign the aforementioned consent form on various grounds, including the privileged nature of the documents sought thereby and the lack of any legal authority requiring him to sign such a consent form.[6]

On May 14, 1998, Respondent filed a motion for order compelling discovery whereby it sought an order from the state workers' compensation hearing officer appointed by the Louisiana Office of Workers' Compensation to hear this matter, compelling Petitioner to, among other things, respond to its Request for Production of Documents. In particular, Respondent sought an order from the state workers' compensation hearing officer, compelling Petitioner to sign the consent form in question.

On July 1, 1998, the state workers' compensation hearing officer heard Respondent's motion for order compelling discovery. Upon conclusion of the hearing, the state workers' compensation hearing officer issued a decision, which for the most part tracked an agreement

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[6] See Petitioner's Objections to Respondent's Written Discovery annexed hereto at App. 11-App. 14.

reached between the parties in an off-the-record meeting. However, the state workers' compensation hearing officer requested further briefing from the parties with respect to Respondent's Requests for Production Nos. 5(B), 5(C) and 5(D), which sought, among other things, to have Petitioner sign the consent form in question. Respondent's request that the state workers' compensation hearing officer enter an order, compelling Petitioner to sign this consent form, was then taken under advisement.

Petitioner subsequently submitted a Supplemental Memorandum in Opposition pursuant to the request therefor made by the state workers' compensation hearing officer wherein Petitioner specifically noted that he was relying upon supreme Federal law, i.e., 42 U.S.C. § 1306(a), in opposing Respondent's request for an order, compelling him to sign the consent form in question.[7] Thus, at this point, Petitioner specifically raised a federal question in the workers' compensation proceeding, i.e., whether entry of the order sought by Respondent would violate supreme Federal law governing the disclosure of records maintained on an individual by the Social Security Administration.

On September 10, 1998, the state workers' compensation hearing officer granted Respondent's motion for order compelling discovery and issued the challenged order, requiring Petitioner to sign the consent form in question. In her written Reasons for Ruling, the state workers' compensation hearing officer acknowledged the

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[7] See Petitioner's Supplemental Memorandum in Opposition annexed hereto at App. 15-App. 20.

applicability of 42 U.S.C. § 1306(a) to the disclosure of Petitioner's records maintained by the Social Security Administration. However, citing the decision of the Supreme Court of Louisiana in *Theodore v. Holi Temporary Service, Inc.*, 97-2521 (La. 12/19/97); 706 So.2d 441, the state workers' compensation hearing officer apparently concluded that said Court had announced a blanket rule, which permits an employer in a workers' compensation proceeding to obtain an order, compelling an unwilling injured worker to sign a consent form ostensibly giving his consent in writing for disclosure to the employer of records maintained on him by the Social Security Administration.

Petitioner sought supervisory review of the state workers' compensation hearing officer's challenged order by timely filing an Application for Supervisory Writs in the Court of Appeal, Third Circuit, State of Louisiana, wherein he specifically relied upon 42 U.S.C. § 1306(a), 5 U.S.C. § 552a(b) and various regulations prescribed by the Social Security Administration.[8] On October 12, 1998, the Court of Appeal, Third Circuit, State of Louisiana, denied in part Petitioners' Application for Supervisory Writs insofar as said Application pertained to the state workers' compensation hearing officer's challenged order, compelling Petitioner to sign the consent form in question. In its decision, the Court of Appeal, Third Circuit, State of Louisiana, specifically referred to the aforementioned federal statutes and regulations; however, said Court also cited *Theodore*, supra, and, apparently feeling constrained thereby, found no error in the state workers'

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[8] See excerpts from Petitioner's Application for Supervisory Writs annexed hereto at App. 21-App. 45.

compensation hearing officer's issuance of the challenged order.

Petitioner then sought supervisory review of the state workers' compensation hearing officer's challenged order by timely filing an Application for a Writ to Issue under the Supervisory Jurisdiction of the Supreme Court of Louisiana wherein he again relied upon 42 U.S.C. § 1306(a), 5 U.S.C. § 552a(b) and various regulations prescribed by the Social Security Administration.[9] On January 8, 1999, the Supreme Court of Louisiana denied Petitioners' Application for a Writ to Issue under its Supervisory Jurisdiction in a one (1) word decision: "Denied."

LAW AND ARGUMENT

(A). RULE 10 CONSIDERATIONS

As shown below, the Supreme Court of Louisiana in *Theodore*, supra, the decision relied upon by the state workers' compensation hearing officer in issuing the challenged order, has decided an important question of Federal law in a way that conflicts with decisions of the United States Court of Appeals for the Eleventh and District of Columbia Circuits. See *Doe*, infra, and *Perry*, infra. Further, the Supreme Court of Louisiana in *Theodore*, supra, has decided an important question of Federal law that has not been, but should be, settled by

[9] See excerpt from Petitioner's Application for a Writ to Issue under the Supervisory Jurisdiction of the Supreme Court of Louisiana annexed hereto at App. 46-App. 76.

this Court. Finally, the Supreme Court of Louisiana in *Theodore*, supra, has decided an important question of Federal law in a way that conflicts with relevant decisions of this Court, interpreting 5 U.S.C. § 552a (the Privacy Act of 1974). See *Braxton v. United States*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

(B). 42 U.S.C. § 1306(a)(1) PREEMPTS STATE LAW

42 U.S.C. § 1306(a)(1) prohibits the disclosure of records maintained on individuals by the Social Security Administration, *"except as the head of [said agency] may by regulations prescribe and except as otherwise provided by Federal law."* 42 U.S.C. § 1306(a)(1) thus provides an unequivocal congressional directive that disclosure of records maintained on individuals by the Social Security Administration will be governed exclusively by Federal law and by regulations prescribed by said agency's head. As such, 42 U.S.C. § 1306(a)(1) preempts state law with respect to this subject matter. See, e.g., *Fidelity Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

(C). SUPREME FEDERAL LAW VIOLATED

20 C.F.R. § 401.100(a) relates to the disclosure of records maintained by the Social Security Administration, and specifically provides that said agency "will not disclose [an individual's] record without [the individual's] written consent", "[e]xcept as permitted by the Privacy Act and the regulations in this chapter, or if required by

the FOIA, . . . ". See also 45 C.F.R. § 5b.9(a)(1). 20 C.F.R. § 401.100(a) thus sets forth a general rule – Social Security does not disclose people's records without their written consent – that is subject to certain exceptions including the Privacy Act, the FOIA and other regulations. See *Mason v. South Bend Community School Corporation*, 990 F.Supp. 1096 (N.D. Ind. 1997). In light of this general rule, the party requesting the records bears the burden to show that release of the records without the written consent of the subject of the records is authorized under applicable law. See *Mason*, supra.

20 C.F.R. § 401.115 specifically relates to the disclosure of records maintained on an individual by the Social Security Administration, when the individual does not consent to disclosure. A review of the procedure mandated by 20 C.F.R. § 401.115, which is utilized by the Social Security Administration for determining whether to disclose such records under these circumstances, i.e., consideration of 20 C.F.R. §§ 120 (required disclosures to other government agencies), 125 (disclosures prohibited by law such as information about drug and alcohol abuse) and 130 (disclosures to the public under the Freedom of Information Act (5 U.S.C. § 552)), ineluctably leads to the conclusion that disclosure of Petitioner's records is governed by the Privacy Act of 1974 (5 U.S.C. § 552a) and section 1106 of the Social Security Act (42 U.S.C. § 1306(a)). This is so because 5 U.S.C. § 552(b)(3) (matters specifically exempted from disclosure by statute) and 552(b)(6) (personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy) remove records maintained on individuals by the Social Security

Administration from the classes of information and records required to be disclosed upon request from the public by 5 U.S.C. § 552 (the Freedom of Information Act). See *United States Department of State v. Ray*, 502 U.S. 164, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991); *United States Department of State v. Washington Post Company*, 456 U.S. 595, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982); *Baldridge v. Shapiro*, 455 U.S. 345, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982); *Department of Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976); and, *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975). See also 45 C.F.R. §§ 5.64 and 5.67.

5 U.S.C. § 552a (the Privacy Act of 1974) is the principal statute referred to by 42 U.S.C. § 1306(a) as "Federal law" governing the disclosure of records maintained on individuals by the Social Security Administration. 5 U.S.C. § 552a(b) prohibits the disclosure of such records *" . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, . . . "*. This Court has previously determined that, when records are covered by the broad terms of 5 U.S.C. § 552a (the Privacy Act of 1974), the disclosure of such records is "prohibited by law" unless 5 U.S.C. § 552 (the Freedom of Information Act) requires the release thereof. See *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994). As shown in the preceding paragraph, 5 U.S.C. § 552 (the Freedom of Information Act) does not require the release of records maintained on individuals by the Social Security Administration because of the exemptions found in 5 U.S.C. § 552(b)(3) and (b)(6).

5 U.S.C. § 552a(b) does set forth twelve (12) instances in which a federal agency such as the Social Security Administration may disclose records maintained on an individual without the individual's consent. However, none of these exceptions to the broad prohibition of 5 U.S.C. § 552a(b) authorizes a state workers' compensation hearing officer to order an injured worker to sign a consent form that purportedly gives his consent to the disclosure of his records maintained by the Social Security Administration to his employer. Certainly, 5 U.S.C. § 552a(b)(11) (disclosure pursuant to the order of a court of competent jurisdiction) cannot be interpreted to authorize such an order as it clearly refers to an order issued to the federal agency maintaining the records, rather than the individual on whom the records are maintained. Indeed, 20 C.F.R. § 401.180 compels this interpretation of an order issued directly to the Social Security Administration, when it refers to 5 U.S.C. § 552a(b)(11): *"The Privacy Act allows us to disclose information when we receive an order from a court of competent jurisdiction."*

See also *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985); *Perry v. State Farm Fire & Casualty Company*, 734 F.2d 1441 (11th Cir. 1984), *cert. denied*, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985); *Miskiel v. The Equitable Life Assurance Society of the United States*, 1999 WL 95998 (E.D. Pa.); *Mason*, supra; and, *Stiles v. Atlanta Gas Light Company*, 453 F.Supp. 798 (N.D. Ga. 1978).

Against this backdrop of supreme Federal statutory law and regulations, and federal jurisprudence interpreting those provisions, the challenged order entered by the state workers' compensation hearing officer in the case *sub judice*, and ultimately the decision of the Supreme

Court of Louisiana in *Theodore*, supra, must be considered. The cryptic opinion issued by the Supreme Court of Louisiana in *Theodore*, supra, reads in its entirety:

> "Granted. Judgment of the hearing officer is vacated and set aside. The motion to compel is granted, and *claimant is ordered to execute an authorization allowing relator to obtain her Social Security disability records. See La. Code Civ.P. art. 1461.* Case remanded to the Office of Workers' Compensation for further proceedings." (Emphasis added.)[10]

Thus, without even mentioning supreme Federal law governing the disclosure of records maintained on individuals by the Social Security Administration, the Supreme Court of Louisiana, in *Theodore*, supra, looked to a state discovery provision, i.e., LSA-C.C.P. Art. 1461 (which is taken almost verbatim from Fed. Rules Civ. Proc., Rule 34(a)), and ordered the workers' compensation claimant in that case to execute a consent form that purportedly gave her consent to the disclosure of records maintained on her by the Social Security Administration to her employer. Parenthetically, *Theodore*, supra, not only conflicts with supreme Federal law governing the disclosure of records maintained on individuals by the Social Security Administration, and the federal jurisprudence interpreting said law, but effectively reads that law out of existence. Practically, *Theodore*, supra, is an affront to the sovereignty of the United States in conducting its affairs, which is simply unacceptable. See *Kohl v. United States*, 91 U.S. 367, 1 Otto 367, 23 L.Ed. 449 (1875). In

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[10] See the decision of the Supreme Court of Louisiana in *Theodore*, supra, annexed hereto at App. 77.

essence, the Supreme Court of Louisiana has judicially created a thirteenth (13th) exception to 5 U.S.C. § 552a(b) thus usurping the legislative powers specifically reserved to The Congress by Article I of the United States Constitution.

At this point, it must be noted that Petitioner does not contend that LSA-C.C.P. Art. 1461 is unconstitutional. Rather, Petitioner asserts that the judicial interpretation of LSA-C.C.P. Art. 1461 given by the Supreme Court of Louisiana in *Theodore*, supra, is unconstitutional as being in violation of supreme Federal law, which unconstitutional interpretation was followed by the state workers' compensation hearing officer in issuing the challenged order. Further, the obvious must also be noted, i.e., coercion by court order is not "consent" as that term is used in the federal statutes and regulations governing the disclosure of records maintained on individuals by the Social Security Administration. In fact, 45 C.F.R. § 5b.9(a)(1) describes "consent" for such disclosure as that "provided to the Department *by the subject individual on his own initiative, . . .* ". Certainly, if Petitioner was to comply with the challenged order, he would not be signing the consent form submitted by Respondent "on his own initiative".

U.S.C. Const. Art. VI, cl. 2, provides:

> *"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;* and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the*

> *Constitution or Laws of any State to the Contrary notwithstanding.*" (Emphasis added.)

Theodore, supra, cannot stand in light of U.S.C. Const. Art. VI, cl. 2, and this Court's jurisprudence interpreting said constitutional provision; thus, this Court should now repudiate *Theodore*, supra, and its illicit progeny, and reverse the challenged order entered by the state workers' compensation hearing officer in the case *sub judice*.

This Court, in *Public Utilities Commission of State of California v. United States*, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958), a case that applied U.S.C. Const. Art. VI, cl. 2, to invalidate state regulations that interfered with the transportation by common carrier of property belonging to the United States, recalled the venerable utterance of Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579:

> " '*It is of the very essence of supremacy to remove all obstacles to its action within its own sphere*, and so to modify every power vested in subordinate governments, as *to exempt its own operations from their own influence.*' " (Emphasis added.) *Id.* at 355 U.S., 534, 545, 78 S.Ct. 446, 453.

See also *Rose v. Arkansas State Police*, 479 U.S. 1, 107 S.Ct. 334, 93 L.Ed.2d 183 (1986) (citing the Supremacy Clause to reverse a state appellate court determination in an Arkansas workers' compensation proceeding that benefits paid under federal Public Safety Officer's Death Benefits Act should be offset by death benefits payable to widow pursuant to Arkansas workers' compensation statutes.)

There can be no doubt that the disclosure of records maintained on an individual by a federal agency such as the Social Security Administration constitutes an action residing exclusively within the sphere of operations reserved to the federal government, which is exempt from interference by the States. There can also be no doubt that federal regulations such as those cited herein are encompassed by the phrase "Laws of the United States" found in U.S.C. Const. Art. VI, cl. 2. In *City of New York v. Federal Communications Commission*, 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988), this Court specifically held:

> "This case involves the latter kind of pre-emption, and here *the inquiry becomes whether the federal agency has properly exercised its own delegated authority* rather than simply whether Congress has properly exercised the legislative power. Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for *"[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." [Citation omitted.]* Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. *The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.* Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-

> empts any state efforts to regulate in the forbidden area. *[Citations omitted.] It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies.* Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *[Citations omitted.] Id.* at 486 U.S. 57, 64, 108 S.Ct. 1637, 1642.

See also *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

Finally, in *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952), this Court noted the binding effect of U.S.C. Const. Art. VI, cl. 2, on the state courts and this Court's willingness to rectify any transgression thereof committed by said courts, holding:

> "The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. *State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."* (Emphasis added.) *Id.* at 344 U.S. 237, 247-248, 73 S.Ct. 236, 242.

See also *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) ("The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."); and, *Lee v. State of Florida*, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166 (1968).

CONCLUSION

The decision of the Supreme Court of Louisiana in *Theodore*, supra, and the challenged order issued by the state workers' compensation hearing officer pursuant thereto in the case *sub judice*, conflict with supreme Federal law and thus are without effect under U.S.C. Const. Art. VI, cl. 2. If allowed to stand, these rulings will severely and adversely impact the operations of the Social Security Administration. This is obviously so because individuals required to provide the Social Security Administration with extremely personal and private information regarding themselves and their particular situations will be reluctant to do so (and may even forego pursuit of benefits to which they are entitled under Federal law) for fear that a state workers' compensation hearing officer may subsequently order them to execute a consent form purportedly giving their consent to the disclosure of that information by said federal agency to someone else such as an employer. The Congress by statute, i.e., 5 U.S.C. § 552 (the Freedom of Information Act), 5 U.S.C. § 552a (the Privacy Act of 1974) and 42 U.S.C. § 1306(a), and the Social Security Administration by properly prescribed regulations, i.e., 20 C.F.R.

§§ 401.100(a), 401.115 and 401.80, and 45 C.F.R. §§ 2.5, 5.3, 5.64, 5.67 and 5b.9(a)(1), do not authorize the issuance of such an order by a state workers' compensation hearing officer; and, in fact, said statutes and regulations specifically prohibit it.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court summarily GRANT this Petition for a Writ of Certiorari, REVERSE the challenged order entered by the state workers' compensation hearing officer and REMAND this case to the Louisiana Office of Workers' Compensation for further proceedings consistent with its decision.

Respectfully submitted:

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Counsel of Record
CURTIS & LAMBERT
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Attorney for Petitioner
Edward Weekly

EDWARD WEEKLY
VERSUS
CAJUN BAG COMPANY

DOCKET NUMBER
97-08278,
DIST. 04
OFFICE OF WORKERS' COMPENSATION
STATE OF LOUISIANA

ORDER COMPELLING DISCOVERY

This matter came for hearing on July 1, 1998 on the Motion to Compel Discovery filed on behalf of the employer, Cajun Bag Company. Present were Lawrence N. Curtis on behalf of the employee, Edward Weekly, and Jeffrey C. Napolitano on behalf of Cajun Bag Company. The court, considering the agreements and arguments of counsel, for reasons assigned in open court, and additionally, for written reasons assigned this date, orders as follows:

IT IS ORDERED, ADJUDGED AND DECREED, in accordance with the oral reasons assigned, that the employee, Edward Weekly, supplement his interrogatory responses to provide additional answers to interrogatories numbered 9, 10 and 12, and that Edward Weekly respond to the request for production of documents number 2, 3, 4, 5A and 5E on or before July 6, 1998, with the right to incorporate by reference any previously furnished information or documentation in said responses.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, in accordance with written reasons of this date, that Edward Weekly provide the authorizations requested in the defendant's request for production, numbers 5B and 5C, on or before September 21, 1998.

ORDER READ AND SIGNED this 10th day of September, 1998.

/s/ Sharon M. Morrow
SHARON M. MORROW
WORKERS' COMPENSATION JUDGE
OFFICE OF WORKERS'
COMPENSATION

EDWARD WEEKLY

VERSUS

CAJUN BAG COMPANY

DOCKET NUMBER 97-08278, DIST. 04

OFFICE OF WORKERS' COMPENSATION

STATE OF LOUISIANA

REASONS FOR RULING

This matter came for hearing on the employer's motion to compel certain discovery responses. After hearing, the court ruled on some of the issues, but took under advisement the employer's right to written authorization from the employee to obtain the employee's records with the Louisiana Department of Labor (request 5B), Social Security records (request 5C), and employment records (request 5D). In post hearing briefing, the employer withdrew its request for employment record authorization, making a response to or ruling on request 5D unnecessary. The court therefore considers whether the employer is entitled to a written authorization from Mr. Weekly for Louisiana Department of Labor and Social Security records.

Weekly contends that the Social Security records are protected by the privilege established in 42 U.S.C. sec. 1306(a), and that the state Department of Labor records are privileged under La.R.S. 23:1660.C(1), both of which are quoted in his brief, and both of which, as quoted, do provide for the privilege claimed. However, the employer argues that the recent Louisiana Supreme Court case of *Theodore vs. Holi Temporary Service, Inc.*, 97-2521 (La. 12/19/97), 706 So.2d 441, allows the relief sought with

respect to the Social Security records, and by analogy, the state Department of Labor records.

The court agrees with the employer that the Supreme Court's ruling in *Theodore* allows for the relief sought. Though the ruling is extremely short, it clearly grants a motion to compel execution of an authorization for Social Security disability records in a workers' compensation case. Further, with respect to the Louisiana Department of Labor records, the court notes that in his brief, Mr. Weekly's counsel cites 23:1660.C(1) in its form prior to the 1995 amendment. The 1995 amendment allows for inspection of employment records and reports by "the office of workers' compensation for information as to the limited questions of whether benefits have been paid and for which period of time for limited purposes of resolution of any workers' compensation claim dispute . . . " As Mr. Weekly's date of injury appears to be after the effective date of the 1995 amendment, there can be no argument that this amended version of the statute applies. The form prepared by the employer in this case only pertains to unemployment benefits or insurance paid on Weekly's behalf, and therefore appears to be in compliance with the statute. In light of the Supreme Court's ruling in *Theodore* and the exception provided in 23:1660.C(1), the court finds that the employer is entitled to the authorizations requested.

Thus done this 10th day of September, 1998.

/s/ Sharon M. Morrow
SHARON M. MORROW
WORKERS' COMPENSATION JUDGE
OFFICE OF WORKERS' COMPENSATION

NUMBER 98-1518
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

EDWARD WEEKLY

VERSUS

CAJUN BAG COMPANY

October 12, 1998
Lake Charles, La.

WRIT GRANTED AND MADE PEREMPTORY, IN PART:
WRIT DENIED, IN PART:

The hearing officer erred in ordering plaintiff to execute an authorization for the release of records of the Louisiana Department of Labor. La. R.S. 23:1660C(1) indicates records of the Louisiana Department of Labor are confidential and are not to " . . . be published or open to public inspection, other than to public employees in the performance of their public duties, including the office of workers' compensation for information as to the limited questions of whether benefits have been paid and for which period of time for limited purposes of resolution of any workers' compensation claim dispute or fraud investigation under the Workers' Compensation Act. . . . " This provision allowing for inspection by employees of the Office of Workers' Compensation does not authorize the hearing officer to order a claimant to execute an authorization for release of such records to a defendant in a workers' compensation case. Accordingly, the judgment of the hearing officer with respect to the authorization for the release of records of the Louisiana Department of Labor is reversed and set aside.

With respect to the authorization for the release of social security records, there is no error in the hearing officer's ruling. 42 U.S.C. § 1306(a); 20 CFR § 401.105, 401.110, and 401.115; 5 U.S.C. § 552(b)(6); 5 U.S.C. 552a(b)(11) and *Theodore v. Holi Temporary Service, Inc.* 97-2521 (La. 12/19/97); 706 So.2d 441. Accordingly, the writ is denied as to the portion of the judgment ordering plaintiff to execute an authorization for the release of social security records.

JDS	JCP	GBG
J.D.S.	J.C.P.	G.B.G.

COOKS, J., dissents, in part, and concurs, in part, for the following reasons:

> The writ application fails to demonstrate the reason respondent seeks relator's social security records in the absence of a showing of the relevancy of the social security records to this workers' compensation proceeding, plaintiff should not be forced to authorize the release of these personal and protected records in this workers' compensation proceeding. On the issue of the release of records of the Louisiana Department of Labor, I concur.

AMY, J., dissents and would deny the writ finding no error in the order of the workers' compensation judge. See *Theodore vs. Holi Temporary Service, Inc.*, 97-2521 (La. 12/19/97); 706 So.2d 441.

The Supreme Court of the State of Louisiana

EDWARD WEEKLY
VS.
CAJUN BAG COMPANY

NO.
98-CC-2795

IN RE: Weekly, Edward; – Plaintiff(s); Applying for Supervisory and/or Remedial Writ; Office of Workers' Comp. Dist. 4 Number 97-08278; to the Court of Appeal, Third Circuit, Number CW98-1518

January 8, 1999

Denied.

CDT
PFC
WFM
HTL
BJJ
JPV
JTK

KIMBALL, J. not on panel.

Supreme Court of Louisiana
January 8, 1999

/s/ John Tarlton Olivier
Clerk of Court
For the Court

EDWARD WEEKLY	*	DOCKET: 97-08278
VERSUS	*	DISTRICT: 04
CAJUN BAG COMPANY	*	OFFICE OF WORKERS' COMPENSATION
	*	STATE OF LOUISIANA

****

REQUEST FOR PRODUCTION OF DOCUMENTS

TO: EDWARD WEEKLY
Through his Attorney of Record:
Lawrence Curtis
201 Rue Iberville, Suite 300
Lafayette, Louisiana 70598

Defendant, Cajun Bag Company, requests the plaintiff to produce the following documents for inspection and reproduction. This request can be satisfied by mailing the copies to undersigned counsel or by presenting the documents requested at the office of undersigned counsel during the regular business hours between 9:00 a.m. and 5:00 p.m., Monday through Friday, within fifteen (15) days of service hereof.

1. Any and all medical records or reports in your possession concerning examinations, evaluations and/or treatment since the alleged accident in question.

2. All records of expenses incurred by you as a result of the incident sued upon.

3. Your Federal Income Tax Return for the years 1995 to present and any evidence of income for the years 1996 to date.

4. Any and all exhibits and/or documents you plan to introduce into evidence at trial.

5. The authorization forms attached hereto, signed by the claimant.

   A) Medical authorization;

   B) Louisiana Department of Labor records;

   C) Social Security records;

   D) Employment records;

   E) IRS Form 4506; and

   F) Military Records, if applicable.

Respectfully submitted,

JUGE, NAPOLITANO, LEYVA, GUILBEAU & RULI

BY: /s/ Jeffrey C. Napolitano
JEFFREY C. NAPOLITANO #17073
PATRICK J. BROWNE, JR. #24039
3838 N. Causeway Boulevard
Suite 2500
Metairie, Louisiana 70002
Telephone: (504) 831-7270

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading upon attorneys of record for all other parties in this action by placing same, properly addressed, in the U.S. Mail with sufficient postage to insure delivery this 16 day of February, 1998.

/s/ Jeffrey C. Napolitano

AUTHORIZATION TO RELEASE RECORDS

STATE OF LOUISIANA

PARISH OF _____

BEFORE ME, the undersigned authority, personally came and appeared:

Edward Weekly
Social Security No: 439-78-9688
Date of Birth: 11/18/49

who, after being first duly sworn, did depose and say:

I authorize the Social Security Administration to release information about myself to the law firm of JUGE, NAPOLITANO, LEYVA, GUILBEAU & RULI for the purpose my worker's compensation claim against Cajun Bag Company.

The information to be released will include my entire file, including, but not limited to, my application for benefits and medical records.

This consent is in effect for 90 days after the signing of this authorization.

I am the individual to whom the record pertains. I understand that any false representation to knowingly and willfully obtain information from Social Security records is punishable by a fine of not more than $5,000.00 or one year in prison.

_____
Edward Weekly

_____
439-78-9688

_____
(DATE)

DEPARTMENT OF EMPLOYMENT AND TRAINING
OFFICE OF WORKERS' COMPENSATION
BATON ROUGE, LOUISIANA

EDWARD WEEKLY — NUMBER: 97-08278
VERSUS — DISTRICT: 04
CAJUN BAG COMPANY

****

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S WRITTEN DISCOVERY

In general, this Plaintiff objects to Defendant's Written Discovery and, in particular, this Plaintiff objects to the Interrogatories propounded to him by Defendant, Cajun Bag Company, on grounds that said Interrogatories violate Article 1457(B) of the Louisiana Code of Civil Procedure because said Interrogatories exceed thirty-five (35) in number, including subparts.

Furthermore, Plaintiff objects to Defendant's Request for Production of Documents, in general, and, in particular, Request for Production Nos. 1, 3, 4 and 5(A), (B), (C), (D), (E) and (F).

RESPONSE TO REQUEST NO. 1:

Plaintiff objects to this request on grounds, that it is vague, overly broad, burdensome and oppressive, not relevant, nor designed to lead to the discovery of relevant information, in general, and, in particular, this Defendant is already in possession of all medical records and medical reports concerning this Plaintiff since the alleged accident in question.

RESPONSE TO REQUEST NO. 3:

Plaintiff objects to this request on grounds, that it is vague, overly broad, burdensome and oppressive, not relevant, nor designed to lead to the discovery of relevant information, in general, and, in particular, this Defendant is already in possession of all documents relating to or in any way involving money earned by this Plaintiff for the years 1995, 1996 and 1997.

RESPONSE TO REQUEST NO. 4:

Plaintiff objects to this request to the extent that no decision has yet been made concerning the exhibits and documents which this Plaintiff will offer as evidence during the trial of this claim. However, without waiving the stated objection, but specifically reserving same, this Plaintiff will probably offer the deposition testimony of Drs. McKay and Gaar, as well as the deposition testimony of Dr. Michael Berard in the event that Dr. Berard is unable to appear for the trial of this claim. It is also probable that this Plaintiff will offer all pertinent medical records and medical reports. (These medical records and medical reports are already in the possession of this Defendant.)

RESPONSE TO REQUEST NO. 5:

(A) Plaintiff objects to this Request insofar as the proferred Authorization does not comport with Article 1465.1 of the Louisiana Code of Civil Procedure.

(B) Plaintiff objects to this Request insofar as the proferred Authorization seeks records which are in fact privileged and confidential.

(C) Plaintiff objects to this Request insofar as the proferred Authorization seeks records which are in fact privileged and confidential.

(D) Plaintiff objects to this Request, on grounds that there is no provision under Louisiana law which compels an employee to sign this type of authorization, on the contrary, the only type of written authorization for records is specifically made the subject of Article 1465.1 of the Louisiana Code of Civil Procedure.

(E) Plaintiff objects to this Request, on grounds that there is no provision under Louisiana law which compels an employee to sign this type of authorization, on the contrary, the only type of written authorization for records is specifically made the subject of Article 1465.1 of the Louisiana Code of Civil Procedure.

(F) Plaintiff objects to this Request, on grounds that there is no provision under Louisiana law which compels an employee to sign this type of authorization, on the contrary, the only type of written authorization for records is specifically made the subject of Article 1465.1 of the Louisiana Code of Civil Procedure.

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to all known counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 27th day of February, 1998.

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Telephone: (318) 235-1825

BY: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS (4678)

OFFICE OF WORKERS' COMPENSATION
PARISH OF LAFAYETTE
STATE OF LOUISIANA

EDWARD WEEKLY

VERSUS DOCKET NUMBER: 97-08278 "04"

CAJUN BAG COMPANY

****

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL DISCOVERY

MAY IT PLEASE THE COURT:

Defendant's arguments for compelling Plaintiff to sign authorizations for the release of his Social Security and Louisiana Department of Labor records overlook the underlying reason why these records cannot be obtained by means of a subpoena. Both are the subject of statutory privileges, which make it unlawful to subpoena them. Social Security records are privileged under 42 U.S.C. § 1306(a),[1] and Louisiana

---

[1] **(a) Disclosure prohibited; exceptions**

No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. § 1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code of 1939, or under regulations made under authority thereof, which has been transmitted to the Secretary by the Commissioner of Internal Revenue, *or any file, record, report, or other paper, or any information, obtained at any time by the Secretary or by any officer or employee of the Department of Health and Human Services in the course of discharging the duties of the*

Department of Labor records are privileged under La.R.S. 23:1660.C(1).[2]

La.Code Civ.P. art. 1422 provides that "[p]arties may obtain discovery regarding any matter, ***not privileged,*** which is relevant to the subject matter involved in the

---

Secretary under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary or from any officer or employee of the Department of Health and Human Services shall be made except as the Secretary may by regulations prescribe and except as otherwise provided by Federal law. Any person who shall violate any provision of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000.00, or by imprisonment not exceeding one year, or both. [emphasis added.]

[2] C. (1) Information, statements, transcriptions of proceedings, transcriptions of recordings, electronic recordings, letters, memoranda, and other documents and reports thus obtained, or obtained from any individual, claimant, employing unit, or employer pursuant to the administration of this Chapter, except to the extent necessary for the proper administration and enforcement of this Chapter, *shall be held confidential and shall not be subject to subpoena in any civil action or proceeding, nor be published or open to public inspection, other than to public employees in the performance of their duties, in any manner revealing the individual's or employing unit's identity;* however, if requested, an employing unit or employer shall receive with any "notice to appear for a hearing" a copy of the statement which the claimant made regarding his separation from that employing unit or employer and in the same manner and on the same subject, the claimant shall receive a copy of the employer's statement; and additionally, any claimant or his duly authorized representative, at a hearing before an appeal tribunal or the board of review, shall be supplied with information from such records to the extent necessary for the proper presentation of his claim. [emphasis added.]

pending action. . . . Defendant's arguments that the documents are relevant overlook the fact that they are clearly privileged. The Louisiana Supreme Court's cryptic writ ruling in *Theodore v. Holi Temporary Service, Inc.*, 97-2521 (La. 12/19/97), 706 So.2d 441 does not provide any insight into why the court did not uphold the privilege in that case. There is no indication in the three sentence ruling that the privilege was even asserted. The court's citation to La.Code Civ.P. art. 1461 also leaves open the question of why the Legislature deemed it necessary to enact a special provision for compelling the plaintiff to sign medical authorizations, if Article 1461 provided general authority to compel a party to sign authorizations for the production of records.

The federal provision from which Article 1461 was derived, Fed.R.Civ.P. 34, similarly authorizes requests for documents "which are in the possession, custody or control of the party upon whom the request is served. . . . " In *Neal v. Boulder*, 142 F.R.D. 325, 327 (D.Colo. 1992), the court concluded that a party could not be compelled under Rule 34 to execute authorizations for the release of medical records, explaining:

> "The simple fact is that the medical records sought are not in the care and custody of Plaintiffs. They remain with the medical care providers. At best, Plaintiffs may have a copy of the medical records. If they do, they then have a duty under Fed.R.Civ.P. 34 to make these available for inspection. Defendants' counsel have made clear their desire not to have medical documents produced by Plaintiffs, wanting instead

> unedited records from the medical care provider. Plaintiffs cannot produce medical records over which they do not have control.
>
> * * *
>
> Counsel for Defendants have provided no basis under Fed.R.Civ.P. 34 that would allow this Court to compel the providing of the release forms requested. Plaintiffs do not have custody of the medical records being sought."

The enactment of La.Code Civ.P. art. 1465.1 suggests that the Louisiana legislature also subscribes to that reasoning. The fact that the legislature deemed it necessary to create a specific provision for the release of medical records is a clear indication that there is no general authority to order a party to sign releases for other kinds of records. If such authority already existed, the adoption of La.Code Civ.P. art. 1465.1 would have been a vain and useless act. It is also noteworthy that La.Code Civ.P. art. 1422 was amended to include requests for the release of medical records as a specific method of discovery in addition to requests for the production of documents and things. However, Article 1422 says nothing about requests for the release of other kinds of records.

There might have been compelling reasons for the ruling in *Theodore v. Holi Temporary Service, Inc., supra,* but they are not evident from the court's brief written ruling. Plaintiff submits that in the absence of clear authority, it would be inappropriate to compel discovery of materials, which are the subject of statutory privileges, and which are not covered by any of the discovery devices listed in the Code of Civil Procedure.

With respect to the demand for attorney's fees, Plaintiff cited the well-settled Third Circuit jurisprudence to the effect that an award of attorney's fees under La.Code Civ.P. art. 1469 is improper, unless an order compelling discovery is issued. *See, e.g., LeJeune v. Lafayette Tower Service,* 94-1240 (La.App. 3 Cir. 4/5/95), 653 So.2d 112; *Tate v. Tate,* 442 So.2d 1379 (La.App. 3 Cir. 1983). As the court noted in the *Tate* decision, there is some contrary authority, including *Smith v. Smith,* 398 So.2d 549 (La.App. 1 Cir. 1979), *writ. denied,* 399 So.2d 585 (La. 1980), which was cited by Defendant in its supplemental memorandum. However, it is clear from the *LeJeune* decision that the prevailing rule in the Third Circuit is that if discovery responses are provided prior to the hearing on a motion to compel, eliminating the need for issuing an order compelling discovery, attorney's fees may not be awarded.

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BY: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS (4678)

CERTIFICATE

I HEREBY CERTIFY that the foregoing has this day been served upon all counsel of record by placing a copy of same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana this 20th day of July, 1998.

/s/ Lawrence N. Curtis
LAWRENCE N. CURTIS

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NUMBER:

EDWARD WEEKLY

Plaintiff-Relator

VERSUS

CAJUN BAG COMPANY

Defendant-Respondent

ON APPLICATION FOR WRITS OF CERTIORARI, MANDAMUS, PROHIBITION AND/OR REVIEW TO THE OFFICE OF WORKERS' COMPENSATION – DISTRICT 04, PARISH OF LAFAYETTE, STATE OF LOUISIANA, SHARON M. MORROW, ADMINISTRATIVE HEARING OFFICER, PRESIDING

ORIGINAL APPLICATION FOR SUPERVISORY WRITS ON BEHALF OF EDWARD WEEKLY, PLAINTIFF-RELATOR

CURTIS & LAMBERT
(A Professional Law Corporation)
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By: LAWRENCE N. CURTIS (4678)

ATTORNEY OF RECORD FOR EDWARD WEEKLY, PLAINTIFF-RELATOR, IN THIS WORKERS' COMPENSATION MATTER

TO THE HONORABLE JUDGES OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA:

Plaintiff-Relator, Edward Weekly, (Petitioner) appearing through undersigned counsel, respectfully petitions this Honorable Court to issue writs of certiorari, mandamus, prohibition and/or review, directed to the Office of Workers' Compensation – District 04, Parish of Lafayette, State of Louisiana, Sharon M. Morrow, Administrative Hearing Officer presiding, in that certain workers' compensation proceeding entitled ***"Edward Weekly v. Cajun Bag Company"***, Docket Number 97-08278, currently pending before the Office of Workers' Compensation, in support whereof Petitioner gives this Court to understand the following:

GROUNDS ON WHICH THE SUPERVISORY JURISDICTION OF THIS COURT IS INVOKED

The subject matter of this workers' compensation proceeding involves Petitioner's claims asserted against his employer, Defendant-Respondent, Cajun Bag Company, (Defendant) based upon Defendant's failure to furnish Petitioner with necessary medical treatment as required by LSA-R.S. 23:1203(A). This necessary medical treatment consists of medications prescribed by Petitioner's treating physicians as well as surgery recommended by said physicians. Petitioner seeks an order from the Respondent Hearing officer, requiring Defendant to furnish Petitioner with the aforementioned necessary medical treatment and assessing penalties and reasonable attorney fees against Defendant under LSA-R.S. 23:1201(F).

In connection with the proceedings below, this Court should exercise its supervisory powers to reverse the Respondent Hearing officer's erroneous decision issued on September 10, 1998, which granted Defendant's Motion to Compel Answers to Interrogatories and Responses to Request for Production of Documents. This erroneous decision issued by the Respondent Hearing Officer compels Petitioner to execute written authorizations that purportedly permit Defendant to obtain records maintained on Petitioner by the Louisiana Department of Labor and the Social Security Administration.

As shown below, LSA-R.S. 23:1660(C)(1) and (E) prohibits the release of records maintained on Petitioner by the Louisiana Department of Labor under any circumstance. Consequently, Defendant could not obtain records maintained on Petitioner by the Louisiana Department of Labor even with a written authorization signed by Petitioner. Further, governing federal law, i.e., the Privacy Act of 1974 (5 U.S.C. § 552a), 42 U.S.C. § 1306(a) and 20 CFR, § 401(C), do not under any circumstance authorize any court or Hearing Officer to issue an order, compelling an individual to sign a written authorization for the disclosure of records maintained on the individual by the Social Security Administration. Rather, 5 U.S.C. § 552a(b)(11), and the federal jurisprudence interpreting that statute, provide the exclusive method by which Defendant may obtain Petitioner's records maintained by the Social Security Administration in the workers' compensation proceeding ***sub judice.***

On these grounds, Petitioner invokes this Court Is plenary power to exercise supervisory jurisdiction over

the Respondent Hearing Officer, which jurisdiction is conferred upon it by LSA-Const. Art. 5, Section 10(A). Parenthetically, there is no requirement that Petitioner show irreparable injury to obtain the supervisory relief he seeks. As the Supreme Court held in ***Herlitz Construction Company, Inc. v. Hotel investors of New Iberia, Inc.,*** 396 So.2d 878 (La. 1981): "If appellate courts have appellate jurisdiction over interlocutory judgments which cause irreparable injury, ***then the courts' supervisory jurisdiction logically extends to interlocutory judgments that do not cause irreparable injury.***"

STATEMENT OF THE STATUS OF THE CASE

In accordance with Internal Rule 14 of this Court's Internal Rules, Petitioner notes that his workers' compensation

* * *

(See order signed on September 22, 1998, annexed hereto at Application p. 50). Petitioner timely filed this Application for Supervisory Writs.

ISSUES AND QUESTIONS OF LAW PRESENTED FOR DETERMINATION BY THIS COURT

(1). Whether LSA-R.S. 23:1660(C)(1) and (E) permits the disclosure of Louisiana Department of Labor records to a party to a workers' compensation proceeding upon receipt by the Department of a written authorization signed by a claimant, who may have previously filed a claim for unemployment compensation benefits?

(2). Whether governing federal law authorizes any court or the Hearing Officer to compel an individual to sign a written authorization for the release of said individual's records maintained by the Social Security Administration?

ASSIGNMENTS OF ERROR

(1). The Respondent Hearing Officer committed an egregious and reversible error of law by ignoring LSA-R.S. 23:1660(C)(1) and (E) and ordering Petitioner to sign a written authorization purporting to authorize Defendant to obtain records maintained on Petitioner by the Louisiana Department of Labor, when said statute does not permit the disclosure of such records to a party to a workers' compensation proceeding under any circumstance.

(2). The Respondent Hearing officer committed an egregious and reversible error of law by ignoring governing federal law and ordering Petitioner to sign a written authorization purporting to authorize Defendant to obtain records maintained on Petitioner by the Social Security Administration, when said federal law does not authorize such an order.

LAW AND ARGUMENT

* * *

(B). SOCIAL SECURITY ADMINISTRATION RECORDS

There can be no doubt that federal law governs the disclosure of records maintained on an individual such as Petitioner by an agency of the United States government such as the Social Security Administration. As shown below, The Congress has enacted specific legislation, i.e., the Privacy Act of 1974 (5 U.S.C. § 552a) and 42 U.S.C. § 1306(a), which govern such disclosures. Further, the Social Security Administration has adopted regulations pursuant to specific federal statutory authority that govern such disclosures. Consequently, state law in this area is preempted by federal law.

With respect to the disclosure of Social Security Administration records, 42 U.S.C. § 1306(a) provides:

> **§ 1306. Disclosure of information in possession of Social Security Administration or Department of Health and Human Services**
>
> (a) *Disclosure prohibited;* exceptions
>
> (1) *No disclosure* of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. 1001 et seq.] or under subchapter E of chapter I or subchapter A of chapter 9 of the Internal Revenue Code of 1939, or under regulations made under authority thereof, which has been transmitted to

the head of the applicable agency by the Commissioner of Internal Revenue, or *of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by any officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.* Any person who shall violate any provision of this section *shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.*

(2) For purposes of this subsection and subsection (b) of this section, *the term "applicable agency" means –*

(A) *the Social Security Administration, with respect to matter transmitted to or obtained by such Administration or matter disclosed by such Administration,* or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department." (Emphasis added)." (Emphasis added).

A review of the regulations prescribed by the Social Security Administration, i.e., 20 CFR, § 401(C), for the

disclosure of records and information maintained on individuals by said agency reveals a complex interplay between said regulations, the Privacy Act of 1974 (5 U.S.C. § 552a) and the Freedom of Information Act (5 U.S.C. § 552b), especially in the case of an individual who does not consent to the disclosure of his records. While the furnishing of written consent by Petitioner to Defendant would obviate consideration of many provisions that would otherwise be applicable, Petitioner respectfully submits that utilizing the judicial power of the state to force him to execute a written consent in Defendant's favor to obtain his Social Security Administration records is really not consent at all. In fact, Defendant's use of a "consent" form that Petitioner was compelled to sign might very well constitute a criminal offense under 5 U.S.C. § 552a(i)(3), which provides:

> "(i)(1) Criminal penalties. –
>
> .....
>
> (3) ***Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000."*** (Emphasis added).

The exceptions in 42 U.S.C. § 1306(a) for disclosure of information in the possession of the Social Security Administration pursuant to regulations prescribed by the head of said agency and by Federal law refer to 20 CFR, § 401(C), the Privacy Act of 1974 (5 U.S.C. § 552a) and the Freedom of Information Act (5 U.S.C. § 552b). Since it cannot be seriously argued that Petitioner consents to the disclosure of information in his records maintained by

Social Security Administration, 20 CFR, § 401.115 is applicable and provides:

> **§ 401.115 Disclosure of personal information in program records without the consent of the subject of the record.**
>
> *This section describes how various laws control the disclosure or confidentiality of personal information which we keep.* We must consider these laws in the following order:
>
> (a) Some laws require us to disclose information (' 401.120); some laws require us to withhold information (' 401. 125) These laws control whenever they apply.
>
> (b) If no law of this type applies in a given case, then we must look to FOIA principles. See ' 401.130.
>
> (c) When FOIA principles do not require disclosure, we may disclose information if both the Privacy Act and section 1106 of the Social Security Act permit the disclosure. (Emphasis added).

The consideration of 20 CPR §§ 120 (required disclosures to other government agencies), 125 (disclosures prohibited by law such as information about drug and alcohol abuse) and 130 (disclosures to the public under the Freedom of Information Act (5 U.S.C. § 552b)), as required by 20 CFR, § 401.115 (disclosure without the consent of the subject of the record), leads to the conclusion that such a disclosure is governed by the Privacy Act of 1974 (5 U.S.C. § 552a). In particular, disclosure of

records maintained on an individual by the Social Security Administration without the individual's consent is governed by 5 U. S. C. 552a(b), which provides:

> "(b) Conditions of disclosure. – *No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant: to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be –*
>
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> (2) required under section 552 of this title;
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
>
> (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United

States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) ***pursuant to the order of a court of competent jurisdiction;*** or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31." (Emphasis added).

5 U.S.C. § 552a(b)(11) is the only provision of federal law that would permit Defendant to obtain Petitioner's

Social Security Administration records without his consent. This provision has been interpreted in a number of decisions rendered by the federal courts under facts and circumstances similar to those existing in the workers' compensation matter ***sub judice,*** i.e., one party to a proceeding attempting to obtain the Social Security Administration records maintained on another party. A review of these decisions establishes the existence of a conflict in the interpretation of 5 U.S.C. § 552a(b)(11) among the federal courts. This conflict relates to the showing that must be made by the party seeking a court order that will permit disclosure under 5 U.S.C. § 552a(b)(11) of records maintained on an individual by a federal agency such as the Social Security Administration.

On the one hand, there is a line of jurisprudence exemplified by ***Perry v. State Farm Fire & Casualty Company,*** 734 F.2d 1441 (11th Cir. 1984), wherein the United States Court of Appeals for the Eleventh Circuit established a balancing test to be utilized in connection with requests for court orders under 5 U.S.C. § 552a(b)(11). This test requires the court considering the request to balance the need for disclosure against the potential harm to the subject of the disclosure. In ***Perry,*** supra, the defendant moved the federal District Court under 5 U.S.C. § 552a(b)(11) for an order that the Social Security Administration provide information as to when the plaintiff's social security benefits were terminated. ***Perry,*** supra, agreed with the federal District Court's refusal to issue such an order, holding:

"IV. SOCIAL SECURITY TESTIMONY

Before trial, ***State Farm moved the district court under 5 U.S.C. Sec. 552a(b)(11) (West 1977), to order the Social Security Administration to testify as to when Perry's Social Security benefits were terminated. The district court denied the motion,*** stating simply that it had a policy against ordering such information to be produced by the Secretary. State Farm argues that this was reversible error because it prejudiced the arson and misrepresentation defenses by preventing State Farm from establishing that Perry's benefits were officially terminated in December, one month before the fire. As noted above, because of a bureaucratic error, Mrs. Perry continued to receive benefits through February.

Under 5 U.S.C.A. Sec. 552a(b), government agencies can release information about individuals only under certain circumstances. Release is allowed when a court of competent jurisdiction so orders. 5 U.S.C.A. Sec. 552a(b)(11) (West 1977). ***Requests for court orders under Sec. 552a(b)(11) should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure.*** [citation omitted).

Here, ***the balance tilts against disclosure because State Farm had no real need for the Social Security Administration's testimony.*** State Farm could have utilized normal discovery procedures to obtain information about the termination date from plaintiff or plaintiff's counsel, who had represented the plaintiff before the Social Security Administration. Moreover, on

cross-examination, State Farm had an opportunity to ask Mrs. Perry when her benefits were officially terminated, but did not do so.

We find that the denial of the request for production of Social Security testimony was not error.

Accordingly, we AFFIRM." (Emphasis added). Id. p. 1446.

Similarly, in ***Stiles v. Atlanta Gas Light Company,*** 453 F.Supp. 798 (N.D. Ga. 1978), the federal District Court found that requests for court orders under 5 U.S.C. § 552a(b)(11) required the application of the aforementioned balancing test. ***Stiles,*** supra, also found that mere issuance of a subpoena (although considered to be a court order) to a federal agency was insufficient to obtain disclosure under 5 U.S.C. § 552a(b)(11). On these points, ***Stiles,*** supra, held:

"Defendant also argues that the exception permitting disclosure of a record "pursuant to the order of a court of competent jurisdiction" is applicable in the instant action. 5 U.S.C. s 552a(b)(11) It asserts that the subpoena issued here is such an order of the court. Again, however, the court must disagree. ***Section 552a(b)(11) provides for those cases in which, for compelling reasons, the court specifically directs that a record be disclosed. Mere issuance in discovery proceedings of a subpoena which is always subject to the power of the court to quash or limit does not meet this standard.*** See [citation omitted]. ***To so hold would permit precisely the type of privacy invasions the Act sought to prevent.***

> ***In view of the foregoing, it is clear that the Privacy Act will prevent disclosure in this case of the subpoenaed documents unless the court specifically orders them produced pursuant to section 552a(b)(11).*** Although defendant has not requested a court order under this section, it has indicated its reasons for seeking the material. Since both parties have addressed this point in their discussions of the relevancy of the documents, ***the court will consider the propriety of issuing an order requiring production.***
>
> .....
>
> See American Training Services, Inc. v. Veterans Administration, 434 F.Supp. 988, 1002 (D.N.J.1977). ***Since the court concludes that an estoppel defense of this sort would be without merit, it finds that the documents in question are not necessary to the preparation of defendant's case and declines to issue an order excepting the documents from the protection of the Privacy Act.***
>
> ***Accordingly, because the Privacy Act of 1974, 5 U.S.C. s 552a, proscribes disclosure of the subpoenaed documents at issue here, the court directs that the subpoena issued to Mr. William Sexton be quashed."*** (Emphasis added). Id. p. 800.

See also ***Christy v. United States,*** 68 F.R.D. 375 (N.D. Tex. 1975).

On the other hand, there is a line of jurisprudence exemplified by ***Laxalt v. McClatchy,*** 809 F.2d 885 (D.C. Cir. 1987), wherein the United States Court of Appeals for the District of Columbia Circuit disagreed with ***Perry,*** supra, and found that 5 U.S.C. § 552a(b)(11) did not

require the application of a balancing test to a request thereunder for a court order to obtain disclosure of records maintained on an individual by a federal agency. ***Laxalt,*** supra, concluded that 5 U.S.C. § 552a(b)(11) did not establish any qualified discovery privilege with respect to records protected by the Privacy Act of 1974 (5 U.S.C. § 552a). Rather, according to ***Laxalt,*** supra, the only requirement for obtaining a court order under 5 U.S.C. § 552a(b)(11) was a showing of relevancy. However, ***Laxalt,*** supra, went on to note that it did not disagree with the requirement of ***Perry,*** supra, that a court contemplating the issuance of an order under 5 U.S.C. § 552a(b)(11) consider, and take whatever steps are necessary to alleviate, any harm that might result from disclosure of the information in question. ***Laxalt,*** supra, held:

"A. Privacy Act

> Although the District Court did not expressly hold that the Privacy Act creates a qualified discovery privilege, the clear effect of its judgment was to recognize such a privilege by refusing to permit any discovery of the requested documents absent a showing by the appellants of specific "need" beyond mere relevance to the underlying litigation. The Privacy Act, however, does not create a qualified discovery privilege as that concept is generally understood, and we find no basis in the statute or its legislative history for inferring one. Nor does the Act create any other kind of privilege or bar that requires a party to show actual need as a prerequisite to invoking discovery. ***Rather, the plain language of the statute permits disclosure "pursuant to the order of a court of competent***

jurisdiction." 5 U.S.C. Sec. 552a(b)(11) (1982). Neither the statute nor anything in its legislative history specifies the standards for issuance of such a court order. ***We therefore find no basis for inferring that the statute replaces the usual discovery standards of the FRCP – in particular, Rules 26 and 45(b) – with a different and higher standard.***

It is well-settled in this circuit that general statutory bans on publication do not bar limited disclosure in judicial proceedings, including court-supervised discovery. [citations omitted]. We have noted that "where Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language." [citations omitted]. We have therefore refused to infer the creation of a qualified privilege from congressional silence. See [citations omitted]. ***Such an inference is even less justifiable where, as in the Privacy Act, Congress has expressly permitted court-ordered disclosure.***

Once again, we indicate that, absent an express congressional intent to the contrary, the standards set forth in the FRCP must be followed with respect to discovery requests in District Court. ***We therefore hold that a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of Rule 26(b)(1) of the FRCP.***

The fact that a document is subject to the Privacy Act is not, however, irrelevant to the manner in which discovery should proceed. Although discovery standards under the FRCP

permit access to relevant documents protected by the Act, those same FRCP standards give the District Court ample discretion to fashion appropriate protective orders upon a showing of "good cause." [citation omitted]. ***Where the records sought are subject to the Privacy Act, the District Court's supervisory responsibilities may in many cases be weightier than in the usual discovery context.***

.....

[citation omitted]. Thus, as is true with respect to other statutory publication bans, ***the applicability of the Privacy Act to the materials requested is a relevant factor for the District Court to consider in determining the appropriate scope and manner of discovery in a given case. As we have noted in the past, such traditional devices as protective orders and in camera inspection offer reliable means with which to give effect to liberal discovery principles without threatening the interests protected*** by statutory publication bans:

> ***The courts can limit, and in actual practice do limit, the persons having access to information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put.*** No great outcry has arisen that information thus restricted has been leaked, or put to improper uses, by attorneys who are sworn officers of the court.

.....

Procedurally, then, when the District Court considers a request for a Privacy Act order in the discovery context it must consider the use of

protective orders and the possibility of in camera inspection. It should also consider, in its discretion, the wisdom of notifying the affected parties. Although the Privacy Act does not compel the FBI to give notice to the intervenors in this case, the broad authority of the District Court in supervising discovery surely affords it the discretion to give such notice itself and ask the affected parties to appear.

Substantively, even the appellants agree that it is appropriate for the court, in exercising its discretion under Rules 26 and 45(b), to undertake some substantive balancing of interests of the sort contemplated in Perry v. State Farm Fire & Casualty Co., 734 F. 2d 1441, 1447 (11th Cir.1984), cert. denied, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985). Such a balancing test was part and parcel of the FBI's proposed protective order. ***The need to balance conflicting interests*** is entirely different from the proposition we reject today – that merely because records are subject to the Privacy Act they are exempt in their entirety from civil discovery absent a specific showing of "need." This so-called "need" analysis simply finds no support in the case law of this circuit or in the Privacy Act itself.

Perry's notion of balancing is unexceptional on its face: Where the actual content of the record has the potential to cause harm to the affected party, a court supervising discovery should consider this factor in determining how to exercise its traditional authority to limit disclosure. In our view, Perry does not mandate a test of necessity as a prerequisite to initiating discovery of records subject to the Privacy Act.

> However, if Perry may be read to abandon or modify the standards of the FRCP in reviewing discovery requests under the Privacy Act, then we would disagree with its holding." (Emphasis added). Id. pp. 888-890.

See also ***Ford Motor Company v. United States,*** 825 F.Supp. 1081 (U.S.C.I.T. 1993); and, ***Mary Imogene Bassett Hospital v. Sullivan,*** 136 F.R.D. 42 (N.D. N.Y. 1991).

The cited federal jurisprudence establishes that, while there may be a conflict among the courts as to whether 5 U.S.C. § 552a(b)(11) mandates utilization of a "test of necessity" for an order requiring disclosure thereunder, there is agreement that a court presented with a request for an order under 5 U.S.C. § 552a(b)(11) must ***"undertake some substantive balancing of interests"*** and ***"must consider the use of protective orders and the possibility of in camera inspection"*** to protect the privacy rights of the individual whose records form the subject matter of the request. Further, this jurisprudence clearly indicates that the Privacy Act of 1974 (5 U.S.C. § 552a) in general, and 5 U.S.C. § 552a(b)(11) in particular, do not permit any court or Hearing Officer under any circumstance to order an individual to sign a written authorization, which can then be used to obtain his records from the government agency named therein. Rather, the concerns of the Privacy Act of 1974 (5 U.S.C. § 552a) must be accommodated by any court contemplating issuance of an order under 5 U.S.C. § 552a(b)(11) by holding a hearing whereat (a) relevancy of the information in question is established, (b) a substantive balancing of the competing interests of need for the disclosure versus the harm that

might be caused by disclosure is performed and (c) consideration is given to the use of a protective order, an in camera inspection, etc., to protect the privacy rights of the individual whose records form the subject matter of the request.

In the workers' compensation proceeding ***sub judice,*** the Respondent Hearing Officer did not conduct any hearing as required by federal law prior to issuance of her complained of decision. Further, the Respondent Hearing Officer entered an order that is clearly not available under governing federal law, i.e., an order that Petitioner execute a written authorization in favor of Defendant that purports to authorize Defendant to obtain records maintained on Petitioner by the Social Security Administration. Certainly, if The Congress had wished to authorize such orders, it would have done so explicitly in 5 U.S.C. § 552a(b).

Petitioner is aware of the Supreme Court's decision in ***Theodore,*** supra, which apparently orders a claimant in a workers' compensation proceeding to execute an authorization allowing the defendant to obtain her social security disability records. Petitioner respectfully submits that ***Theodore,*** supra, cannot be used to justify the Respondent Hearing Officer's issuance of such an order in the workers' compensation proceeding ***sub judice.*** This is so because there is no discussion in ***Theodore,*** supra, of the underlying facts and circumstances the Supreme Court relied upon in issuing its order. Consequently, it is impossible to determine whether the parties in ***Theodore,*** supra, even presented the Supreme Court with any discussion of

governing federal law. Further, to the extent that ***Theodore***, supra, or any other state law, statutory or jurisprudential, may conflict with governing federal law, state law will be preempted. See U.S.C. Const. Art. VI, cl. 2; ***California Federal Savings & Loan Association v. Guerra***, 479 U.S. 272, 107 S. Ct. 683, 93 L.Ed.2d 613 (1987); and, **California Coastal Commission v. Granite Rock Company,** 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987).

In ordering Petitioner to sign a written authorization in favor of Defendant that purports to allow Defendant to obtain records maintained on Petitioner by the Social Security Administration, the Respondent Hearing Officer failed to comply with governing federal law and granted relief that is clearly not available under said law.

CONCLUSION

LSA-R.S. 23:1660(C)(1) and (E) will not permit Defendant to obtain records maintained on Petitioner by the Louisiana Department of Labor even with a written authorization signed by Petitioner. In fact, LSA-R.S. 23:1660(C)(1) and (E) make it a criminal offense for the Louisiana Department of Labor to release to Defendant the information it seeks under these facts and circumstances. Thus, the Respondent Hearing Officer's complained of decision that Petitioner sign a written authorization in favor of Defendant purporting to allow Defendant to obtain information maintained on Petitioner by the Louisiana Department of Labor is a vain and meaningless act, which the Department must ignore or face the prospect of criminal penalties.

Additionally, the Respondent Hearing Officer's complained of decision that Petitioner sign a written authorization purporting to allow Defendant to obtain records maintained on Petitioner by the Social Security Administration issued in violation of the clear mandates of governing federal law. In particular, the Privacy Act of 1974 (5 U.S.C. § 552a), 42 U.S.C. § 1306(a) and 20 CFR, § 401(C) do not authorize any court or Hearing Officer under any circumstance to issue such an order. Rather, 5 U.S.C. § 552a(b)(11), and the federal jurisprudence interpreting that statute, provide the exclusive method by which Defendant may obtain Petitioner records maintained by the Social Security Administration in the workers' compensation proceeding ***sub judice***. In summary, the Respondent Hearing Officer may issue an order under 5 U.S.C. § 552a(b)(11) that Petitioner's records maintained by the Social Security Administration be disclosed to Defendant only after conducting a hearing whereat (a) the relevancy of the information in question is established, (b) a substantive balancing of the competing interests of need for disclosure versus the harm that might be caused by disclosure is performed and (c) consideration is given to the use of a protective order, an in camera inspection, etc., to protect the privacy rights of Petitioner.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court peremptorily issue writs of certiorari, mandamus, prohibition and/or review, reversing the Respondent Hearing Officer's erroneous decision signed on September 10, 1998, that orders Petitioner to sign written authorizations in favor of Defendant, Cajun Bag Company, purporting to allow Defendant to obtain records maintained on Petitioner by the Louisiana

Department of Labor and the Social Security Administration.

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By: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS
(4678)

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned notary public, personally came and appeared Mr. Lawrence N. Curtis, who, after being duly sworn by me, did depose and say that: Affiant is counsel of record for Plaintiff-Relator, Edward Weekly; copies of this Application for Supervisory Writs have been supplied to the Respondent Hearing officer and to opposing counsel by United States Mail, postage prepaid and properly addressed; and, all of the allegations made in this Application for Supervisory Writs are true and correct to the best of Affiant's knowledge, information and belief.

The Respondent Hearing Officer is:

Sharon M. Morrow
Department of Labor
Office of Workers' Compensation
556 Jefferson Street, 3rd Floor
Lafayette, Louisiana 70501-6947
(318) 262-1057

The attorney of record for Defendant-Respondent, Cajun Bag Company, is:

Jeffery C. Napolitano, Esq.
3838 North Causeway Boulevard
Suite 2500, Lakeway 3
Metairie, Louisiana 70002
(504) 831-7270

/s/ Lawrence N. Curtis
LAWRENCE N. CURTIS

SWORN TO AND SUBSCRIBE BEFORE ME on this 5th day of October, 1998.

/s/ Darlene S. Thibodeaux
NOTARY PUBLIC

DARLENE S. THIBODEAUX, NOTARY PUBLIC
In And For The State Of Louisiana
My Commission is For Life

SUPREME COURT

OF THE

STATE OF LOUISIANA

DOCKET NUMBER:

EDWARD WEEKLY

Plaintiff-Relator

VERSUS

CAJUN BAG COMPANY

Defendant-Respondent

ON APPLICATION FOR A WRIT TO ISSUE UNDER THE SUPERVISORY JURISDICTION OF THE HONORABLE SUPREME COURT OF LOUISIANA TO THE OFFICE OF WORKERS' COMPENSATION – DISTRICT 04, PARISH OF LAFAYETTE, STATE OF LOUISIANA, SHARON M. MORROW, ADMINISTRATIVE HEARING OFFICER, PRESIDING

ORIGINAL APPLICATION FOR A WRIT TO ISSUE UNDER THE SUPREME COURT'S SUPERVISORY JURISDICTION ON BEHALF OF EDWARD WEEKLY, PLAINTIFF-RELATOR

CURTIS & LAMBERT
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**By: LAWRENCE N. CURTIS,
ATTORNEY OF RECORD FOR
PLAINTIFF-RELATOR,
EDWARD WEEKLY, IN THIS
WORKERS' COMPENSATION
MATTER**

TO THE HONORABLES THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF LOUISIANA:

Plaintiff-Relator, Edward Weekly, (Petitioner) appearing through undersigned counsel, respectfully petitions this Honorable Court to issue a writ under its supervisory jurisdiction directed to the office of Workers' Compensation – District 04, Parish of Lafayette, State of Louisiana, Sharon M. Morrow, Administrative Hearing Officer presiding, in that certain workers' compensation proceeding entitled ***"Edward Weekly v. Cajun Bag Company"***, Docket Number 97-08278, currently pending before the office of Workers' Compensation, in support whereof Petitioner gives this Court to understand the following:

STATEMENT OF THE CONSIDERATIONS SET FORTH IN RULE X, § (1)(a), PRESENT IN THIS CASE

The subject matter of this workers' compensation proceeding involves Petitioner's claims asserted against his employer, Defendant-Respondent, Cajun Bag Company, (Defendant) based upon Defendant's failure to furnish Petitioner with necessary medical treatment as required by LSA-R.S. 23:1203(A). This necessary medical treatment consists of medications prescribed by Petitioner's treating physicians as well as surgery recommended by said physicians. Petitioner seeks an order

from the Respondent Hearing Officer, requiring Defendant to furnish Petitioner with the aforementioned necessary medical treatment and assessing penalties and reasonable attorney fees against Defendant under LSA-R.S. 23:1201(F).

In connection with the proceedings below, this Court should exercise its supervisory powers to reverse the Respondent Hearing officer's erroneous decision issued on September 10, 1998, which granted Defendant's Motion to Compel Answers to Interrogatories and Responses to Request for Production of Documents. This erroneous decision issued by the Respondent Hearing Officer compels Petitioner to execute a written authorization that purportedly permits Defendant to obtain records maintained on Petitioner by the Social Security Administration. The Honorable Court of Appeal, Third Circuit, denied in part Petitioner's Application for Supervisory Writs, and it refused to correct this erroneous ruling, based upon its finding of "no error in the hearing officer's ruling."

Within the meaning of Rule X, § (1)(a)(3), of this Court's Rules, the Honorable Court of Appeal, Third Circuit, has rendered a decision in accord with a controlling precedent of this Court, i.e., ***Theodore v. Holi Temporary Service, Inc.*** 97-2521 (La. 12/19/97); 706 So.2d 441, which controlling precedent should be overruled or substantially modified. This is so because this Court's decision in ***Theodore,*** supra, which relies on LSA-C.C.P. Art. 1461 in ordering a workers' compensation claimant to execute written authorizations for the release of her social security records to the defendant, directly conflicts with supreme Federal law, i.e., 42 U.S.C. § 1306(a), which

prohibits disclosure of records maintained on an individual by the Social Security Administration, " . . . ***except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.***" As supreme Federal law (not LSA-C.C.P. Art. 1461) governs the disclosure of records maintained on an individual by the Social Security Administration, this Court's course in this matter is clearly charted by U.S.C. Const. Art. VI, cl. 2, which provides:

> "**Clause 2. Supreme Law of Land**
>
> ***This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;*** and all Treaties made, or which shall be made, under the Authority of the United States, ***shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.***" (Emphasis added).

See, e.g., *Lee v. State of Florida*, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166 (1968); *Swift & Company v. Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); and, *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952).

Consequently, this Court is bound by 42 U.S.C. § 1306(a) notwithstanding anything to the contrary it may find in LSA-C.C.P. Art. 1461. As shown below, governing federal law, i.e., the Privacy Act of 1974 (5 U.S.C. § 552a), 42 U.S.C. § 1306(a) and 20 CFR, § 401(C) do not under any circumstance authorize any court or Hearing Officer to issue an order, compelling an individual to sign a written authorization for the disclosure of records maintained on

the individual by the Social Security Administration. Rather, 5 U.S.C. § 552a(b)(11), and the federal jurisprudence interpreting that statute, provide the exclusive method by which Defendant may obtain Petitioner's records maintained by the Social Security Administration in the workers' compensation proceeding *sub judice*.

On these grounds, Petitioner invokes this Court's plenary power to exercise supervisory jurisdiction over the Respondent Hearing Officer, which jurisdiction is conferred upon it by LSA-Const. Art. 5, Section 5(A). This Court should now overrule ***Theodore***, supra, and reverse the Respondent Hearing Officer's complained of ruling.

STATEMENT OF THE CASE

On December 12, 1997, Petitioner filed a Disputed Claim for Compensation, instituting a workers' compensation proceeding against Defendant and National Loss Control. (See Disputed Claim

* * *

Petitioner timely filed his Application for Supervisory Writs. On October 12, 1998, the Court of Appeal, Third Circuit, denied in part Petitioners' Application for Supervisory Writs, i.e., insofar as said Application challenged the Respondent Hearing Officer's complained of ruling with respect to records maintained on Petitioner by the Social Security Administration. (See decision of Court of Appeal, Third Circuit, annexed hereto at Application pp. 80-81). Under Rule X, Section 5(a), of the Rules of this Court, Petitioner has thirty (30) days from October

12, 1998, or until Wednesday, November 11, 1998, to file this Application for Writs, which has been timely filed.

ASSIGNMENT OF ERROR

The Respondent Hearing Officer committed an egregious and reversible error of law by ordering Petitioner to sign a written authorization purporting to authorize Defendant to obtain records maintained on Petitioner by the Social Security Administration in violation of supreme Federal law governing the disclosure of such records.

SUMMARY OF THE ARGUMENT

Supreme Federal law, i.e., the Privacy Act of 1974 (5 U.S.C. § 552a), 42 U.S.C. § 1306(a) and 20 CFR, § 401(C), do not under any circumstance authorize any court or Hearing Officer to issue an order, compelling an individual to sign a written authorization for the disclosure of records maintained on the individual by the Social Security Administration.

LAW AND ARGUMENT

Supreme Federal law governs the disclosure of records maintained on an individual such as Petitioner by an agency of the United States government such as the Social Security Administration. The Congress has enacted specific legislation, i. e., the Privacy Act of 1974 (5 U.S.C. § 552a) and 42 U.S.C. § 1306(a), which govern such disclosures. Further, the Social Security Administration has adopted regulations pursuant to specific federal statutory

authority that govern such disclosures. Consequently, state law in this area is entirely preempted by federal law.

With respect to the disclosure of Social Security Administration records, 42 U.S.C. § 1306(a) provides:

> **"§ 1306. Disclosure of information in possession of Social Security Administration or Department of Health and Human Services**
>
> (a) *Disclosure prohibited;* exceptions
>
> (1) *No disclosure* of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. '1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code of 1939, or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by the Commissioner of Internal Revenue, or *of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by any officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.* Any person who shall violate any provision of this section *shall be deemed guilty of a felony and, upon conviction*

thereof, shall be punished by a fine not exceeding $10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.

(2) For purposes of this subsection and subsection (b) of this section, ***the term "applicable agency" means –***

(A) ***the Social Security Administration, with respect to matter transmitted to or obtained by such Administration or matter disclosed by such Administration,*** or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department." (Emphasis added)." (Emphasis added).

Thus, 42 U.S.C. § 1306(a) specifically and unequivocally prohibits the disclosure of records maintained on an individual such as Petitioner by the Social Security Administration, " . . . ***except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.***" Further, 42 U.S.C. § 1306(a) specifically and unequivocally provides that any person who violates said statute " . . . ***shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.***

A review of the regulations prescribed by the Social Security Administration, i.e., 20 CFR, § 401(C), for the disclosure of records and information maintained on individuals by said agency reveals a complex interplay between said regulations, the Privacy Act of 1974 (5

U.S.C. § 552a) and the Freedom of Information Act (5 U.S.C. § 552b), especially in the case of an individual who does not consent to the disclosure of his records. Petitioner respectfully submits that utilizing the judicial power of the state to force him to execute a written consent in Defendant's favor to obtain his Social Security Administration records constitutes coercion not consent. Consequently, Defendant's use of a "consent" form that Petitioner was compelled to sign might very well amount to a criminal offense under 5 U.S.C. § 552a(i)(3), which provides:

> "(i)(1) Criminal penalties. –
>
> . . . .
>
> (3) ***Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.***" (Emphasis added).

The exceptions in 42 U.S.C. § 1306(a) for disclosure of information in the possession of the Social Security Administration pursuant to regulations prescribed by the head of said agency and by Federal law refer to 20 CFR, § 401(C), the Privacy Act of 1974 (5 U.S.C. § 552a) and the Freedom of Information Act (5 U.S.C. § 552b). Since it cannot be seriously argued that Petitioner consents to the disclosure of information in his records maintained by Social Security Administration, 20 CFR, § 401.115 is applicable and provides:

> **"§ 401.115 Disclosure of personal information in program records without the consent of the subject of the record.**

> ***This section describes how various laws control the disclosure or confidentiality of personal information which we keep.*** We must consider these laws in the following order:
>
> (a) Some laws require us to disclose information ('401.120); some laws require us to withhold information ('401.125). These laws control whenever they apply.
>
> (b) If no law of this type applies in a given case, then we must look to FOIA principles. See '401.130.
>
> (c) When FOIA principles do not require disclosure, we may disclose information if both the Privacy Act and section 1106 of the Social Security Act permit the disclosure." (Emphasis added).

The consideration of 20 CFR §§ 120 (required disclosures to other government agencies), 125 (disclosures prohibited by law such as information about drug and alcohol abuse) and 130 (disclosures to the public under the Freedom of Information Act (5 U.S.C. § 552b)), as required by 20 CFR, § 401.115 (disclosure without the consent of the subject of the record), leads to the conclusion that such a disclosure is governed by the Privacy Act of 1974 (5 U.S.C. § 552a). In particular, disclosure of records maintained on an individual by the Social Security Administration without the individual's consent is governed by 5 U.S.C. § 552a(b), which provides:

> "(b) Conditions of disclosure. – ***No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with***

the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be –

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a

written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) ***pursuant to the order of a court of competent jurisdiction;*** or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31." (Emphasis added).

5 U.S.C. § 552a(b)(11) is the only provision of federal law that would permit Defendant to obtain Petitioner's Social Security Administration records without his consent. This provision has been interpreted in a number of decisions rendered by the federal courts under facts and circumstances similar to those existing in the workers' compensation matter *sub judice*, i.e., one party to a proceeding attempting to obtain the Social Security Administration records maintained on another party. A review of these decisions establishes the existence of a conflict in

the interpretation of 5 U.S.C. § 552a(b)(11) among the federal courts. This conflict relates to the showing that must be made by the party seeking a court order that will permit disclosure under 5 U.S.C. § 552a(b)(11) of records maintained on an individual by a federal agency such as the Social Security Administration.

On the one hand, there is a line of jurisprudence exemplified by ***Perry v. State Farm Fire & Casualty Company,*** 734 F.2d 1441 (11th Cir. 1984), cert. denied 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985), wherein the United States Court of Appeals for the Eleventh Circuit established a balancing test to be utilized in connection with requests for court orders under 5 U.S.C. § 552a(b)(11). This test requires the court considering the request to balance the need for disclosure against the potential harm to the subject of the disclosure. In ***Perry,*** supra, the defendant moved the federal District Court under 5 U.S.C. § 552a(b)(11) for an order that the Social Security Administration provide information as to when the plaintiff's social security benefits were terminated. ***Perry,*** supra, agreed with the federal District Court's refusal to issue such an order, holding:

"IV. SOCIAL SECURITY TESTIMONY

> Before trial, ***State Farm moved the district court under 5 U.S.C. Sec. 552a(b)(11) (West 1977), to order the Social Security Administration to testify as to when Perry's Social Security benefits were terminated. The district court denied the motion,*** stating simply that it had a policy against ordering such information to be produced by the Secretary. State Farm argues that this was reversible error because it prejudiced the arson and misrepresentation defenses

by preventing State Farm from establishing that Perry's benefits were officially terminated in December, one month before the fire. As noted above, because of a bureaucratic error, Mrs. Perry continued to receive benefits through February.

Under 5 U.S.C.A. Sec. 552a(b), government agencies can release information about individuals only under certain circumstances. Release is allowed when a court of competent jurisdiction so orders. 5 U.S.C.A. Sec. 552a(b)(11) (West 1977). ***Requests for court orders under Sec. 552a(b)(11) should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure.*** [citation omitted].

Here, ***the balance tilts against disclosure because State Farm had no real need for the Social Security Administration's testimony.*** State Farm could have utilized normal discovery procedures to obtain information about the termination date from plaintiff or plaintiff's counsel, who had represented the plaintiff before the Social Security Administration. Moreover, on cross-examination, State Farm had an opportunity to ask Mrs. Perry when her benefits were officially terminated, but did not do so.

We find that the denial of the request for production of Social Security testimony was not error.

Accordingly, we AFFIRM." (Emphasis added) Id. p. 1446.

Similarly, in ***Stiles v. Atlanta Gas Light Company,*** 453 F.Supp. 798 (N.D. Ga. 1978), the federal District Court found that requests for court orders under 5 U.S.C.

§ 552a(b)(11) required the application of the aforementioned balancing test. ***Stiles,*** supra, also found that mere issuance of a subpoena (although considered to be a court order) to a federal agency was insufficient to obtain disclosure under 5 U.S.C. § 552a(b)(11). On these points, ***Stiles,*** supra, held:

> ***"Defendant also argues that the exception permitting disclosure of a record "pursuant to the order of a court of competent jurisdiction" is applicable in the instant action.*** 5 U.S.C. s 552a(b)(11). It asserts that the subpoena issued here is such an order of the court. Again, however, the court must disagree. ***Section 552a(b)(11) provides for those cases in which, for compelling reasons, the court specifically directs that a record be disclosed. Mere issuance in discovery proceedings of a subpoena which is always subject to the power of the court to quash or limit does not meet this standard.*** See [citation omitted]. ***To so hold would permit precisely the type of privacy invasions the Act sought to prevent.***
>
> ***In view of the foregoing, it is clear that the Privacy Act will prevent disclosure in this case of the subpoenaed documents unless the court specifically orders them produced pursuant to section 552a(b)(11).*** Although defendant has not requested a court order under this section, it has indicated its reasons for seeking the material. Since both parties have addressed this point in their discussions of the relevancy of the documents, ***the court will consider the propriety of issuing an order requiring production.***
>
> . . . .

> See American Training Services, Inc. v. Veterans Administration, 434 F.Supp. 988, 1002 (D.N.J.1977). ***Since the court concludes that an estoppel defense of this sort would be without merit, it finds that the documents in question are not necessary to the preparation of defendant's case and declines to issue an order excepting the documents from the protection of the Privacy Act.***
>
> ***Accordingly, because the Privacy Act of 1974, 5 U.S.C. s 552a, proscribes disclosure of the subpoenaed documents at issue here, the court directs that the subpoena issued to Mr. William Sexton be quashed."*** (Emphasis added). Id. p. 800.

See also ***Christy v. United States,*** 68 F.R.D. 375 (N.D. Tex. 1975).

On the other hand, there is a line of jurisprudence exemplified by ***Laxalt v. McClatchy,*** 809 F.2d 885 (D.C. Cir. 1987), wherein the United States Court of Appeals for the District of Columbia Circuit disagreed with ***Perry,*** supra, and found that 5 U.S.C. § 552a(b)(11) did not require the application of a balancing test to a request thereunder for a court order to obtain disclosure of records maintained on an individual by a federal agency. ***Laxalt,*** supra, concluded that 5 U.S.C. § 552a(b)(11) did not establish any qualified discovery privilege with respect to records protected by the Privacy Act of 1974 (5 U.S.C. § 552a). Rather, according to ***Laxalt,*** supra, the only requirement for obtaining a court order under 5 U.S.C. § 552a(b)(11) was a showing of relevancy. However, Laxalt, supra, went on to note that it did not disagree with the requirement of ***Perry,*** supra, that a court

contemplating the issuance of an order under 5 U.S.C. § 552a(b)(11) consider, and take whatever steps are necessary to alleviate, any harm that might result from disclosure of the information in question. ***Laxalt,*** supra, held:

> "A. Privacy Act
>
> Although the District Court did not expressly hold that the Privacy Act creates a qualified discovery privilege, the clear effect of its judgment was to recognize such a privilege by refusing to permit any discovery of the requested documents absent a showing by the appellants of specific "need" beyond mere relevance to the underlying litigation. The Privacy Act, however, does not create a qualified discovery privilege as that concept is generally understood, and we find no basis in the statute or its legislative history for inferring one. Nor does the Act create any other kind of privilege or bar that requires a party to show actual need as a prerequisite to invoking discovery. ***Rather, the plain language of the statute permits disclosure "pursuant to the order of a court of competent jurisdiction."*** 5 U.S.C. Sec. 552a(b)(11) (1982). Neither the statute nor anything in its legislative history specifies the standards for issuance of such a court order. ***We therefore find no basis for inferring that the statute replaces the usual discovery standards of the FRCP – in particular, Rules 26 and 45(b) – with a different and higher standard.***
>
> It is well-settled in this circuit that general statutory bans on publication do not bar limited disclosure in judicial proceedings, including court-supervised discovery. [citations omitted].

We have noted that "where Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language." [citations omitted]. We have therefore refused to infer the creation of a qualified privilege from congressional silence. See [citations omitted]. ***Such an inference is even less justifiable where, as in the Privacy Act, Congress has expressly permitted court-ordered disclosure.***

Once again, we indicate that, absent an express congressional intent to the contrary, the standards set forth in the FRCP must be followed with respect to discovery requests in District Court. ***We therefore hold that a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of Rule 26(b)(1) of the FRCP.***

The fact that a document is subject to the Privacy Act is not, however, irrelevant to the manner in which discovery should proceed. Although discovery standards under the FRCP permit access to relevant documents protected by the Act, those same FRCP standards give the District Court ample discretion to fashion appropriate protective orders upon a showing of "good cause." [citation omitted]. ***Where the records sought are subject to the Privacy Act, the District Court's supervisory responsibilities may in many cases be weightier than in the usual discovery context.***

. . . .

[citation omitted]. Thus, as is true with respect to other statutory publication bans, ***the***

applicability of the Privacy Act to the materials requested is a relevant factor for the District Court to consider in determining the appropriate scope and manner of discovery in a given case. As we have noted in the past, such traditional devices as protective orders and in camera inspection offer reliable means with which to give effect to liberal discovery principles without threatening the interests protected by statutory publication bans:

The courts can limit, and in actual practice do limit, the persons having access to information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put. No great outcry has arisen that information thus restricted has been leaked, or put to improper uses, by attorneys who are sworn officers of the court.

. . . .

Procedurally, then, when the District Court considers a request for a Privacy Act order in the discovery context it must consider the use of protective orders and the possibility of in camera inspection. It should also consider, in its discretion, the wisdom of notifying the affected parties. Although the Privacy Act does not compel the FBI to give notice to the intervenors in this case, the broad authority of the District Court in supervising discovery surely affords it the discretion to give such notice itself and ask the affected parties to appear.

Substantively, even the appellants agree that it is appropriate for the court, in exercising its discretion under Rules 26 and 45(b), to

> ***undertake some substantive balancing of interests of the sort contemplated in Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441, 1447 (11th Cir.1984), cert. denied, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985).*** Such a balancing test was part and parcel of the FBI's proposed protective order. ***The need to balance conflicting interests*** is entirely different from the proposition we reject today – that merely because records are subject to the Privacy Act they are exempt in their entirety from civil discovery absent a specific showing of "need." This so-called "need" analysis simply finds no support in the case law of this circuit or in the Privacy Act itself.
>
> ***Perry's notion of balancing is unexceptional on its face: Where the actual content of the record has the potential to cause harm to the affected party, a court supervising discovery should consider this factor in determining how to exercise its traditional authority to limit disclosure.*** In our view, Perry does not mandate a test of necessity as a prerequisite to initiating discovery of records subject to the Privacy Act. However, if Perry may be read to abandon or modify the standards of the FRCP in reviewing discovery requests under the Privacy Act, then we would disagree with its holding." (Emphasis added). Id. pp. 888-890.

See also ***Ford Motor Company v. United States,*** 825 F.Supp. 1081 (U.S.C.I.T. 1993); and, ***Mary Imogene Bassett Hospital v. Sullivan,*** 136 F.R.D. 42 (N.D. N.Y. 1991).

The cited federal jurisprudence establishes that, while there may be a conflict among the courts as to whether 5 U.S.C. § 552a(b)(11) mandates utilization of a

"test of necessity" for an order requiring disclosure thereunder, there is agreement that a court presented with a request for an order under 5 U.S.C. § 552a(b)(11) must "***undertake some substantive balancing of interests***" and "***must consider the use of protective orders and the possibility of in camera inspection***" to protect the privacy rights of the individual whose records form the subject matter of the request. Further, ***this jurisprudence clearly indicates that the Privacy Act of 1974 (5 U.S.C. § 552a) in general, and 5 U.S.C. § 552a(b)(11) in particular, do not permit any court or Hearing Officer under any circumstance to order an individual to sign a written authorization, which can then be used to obtain his records from the government agency named therein.*** Rather, the concerns of the Privacy Act of 1974 (5 U.S.C. § 552a) must be accommodated by any court contemplating issuance of an order under 5 U.S.C. § 552a(b)(11) by holding a hearing whereat (a) relevancy of the information in question is established, (b) a substantive balancing of the competing interests of need for the disclosure versus the harm that might be caused by disclosure is performed and (c) consideration is given to the use of a protective order, an in camera inspection, etc., to protect the privacy rights of the individual whose records form the subject matter of the request.

With respect to records maintained on an individual by the Social Security Administration in particular, one federal District Court has gone so far as to hold that agency regulations "***do not authorize the release of the records for use in civil cases.***" The federal District Court, in ***Mason v. South Bend Community School Corporation,***

990 F.Supp. 1096 (N.D. Ind. 1997), in making the aforementioned ruling, provides a clear illustration of the procedures required by Federal law for obtaining records maintained on an individual by the Social Security Administration, when the individual does not consent to the release of his records. Again, ***Petitioner does not consent to the release of the records maintained on him by the Social Security Administration and his signature on any written authorization for the release of such records coerced by court order cannot be considered "consent".***

In *Mason,* supra, the defendant sought to obtain records maintained on the plaintiff by the Social Security Administration. The defendant initially issued a subpoena for the records to the Social Security Administration; and, when the agency failed to produce the records as commanded by the subpoena, the defendant obtain [sic] an order, compelling the agency to produce the records. When the Social Security Administration failed to comply with order compelling production of the records, the defendant filed a rule to show cause against the agency and its District Manager wherein they were ordered to show cause why they should not be held in contempt. Upon conclusion of the hearing to hold the Social Security Administration in contempt, *Mason,* supra, vacated its order compelling the agency to produce its records, discharged the rule to show cause and found that the agency and its District Manager were not in contempt, holding:

> ***"Social Security refused to produce the documents without Ms. Mason's written consent. At the hearing, Social Security argued that its***

decision to withhold the records is mandated by regulations-45 C.F.R. '2.5 and 20 C.F.R. '401.180. Consequently, compliance with the court's order to produce the documents would require it to act contrary to valid agency regulations. Social Security also argues that the proper method for judicial review of an agency decision is by following procedures under the Administrative Procedure Act claim, not an order to compel followed by an order to show cause why the agency should not be held in contempt. In support of its position, Social Security cites to [*citations omitted*].

SBCSC argues that Social Security could have produced the documents requested without violating any valid agency regulation and that regulations actually mandate that Social Security produce the documents upon the order of a court of competent jurisdiction. There is no disagreement that under the doctrine of [*citation omitted*], ***"a federal employee cannot be compelled to obey a subpoena, even a federal subpoena, that acts against valid agency regulations."*** [*citation omitted*]. *See also* [*citation omitted*]. Rather, the disagreement lies in ascertaining ***whether the regulations applicable here prohibit Social Security from releasing Ms. Mason's records without her written consent,*** thus excusing Social Security's failure to comply with the court's order.

20 C.F.R. '401.100, which addresses disclosure of official records and information held by the Social Security Administration, states, *inter alia*, ***"Except as permitted by the Privacy Act and the regulations in this chapter, or if required by the FOIA, we will not disclose your***

record without your written consent." This regulation sets forth *a general rule – Social Security does not disclose people's records without their written consent – that is subject to certain exceptions including the Privacy Act, the FOIA and other regulations.* In light of this general rule, *the party requesting the records bears the burden to show that release of the records without the written consent of the subject of the records is authorized under applicable law.*

SBCSC identifies 5 U.S.C. '552a of the Privacy Act as the applicable exception here. Section 552a(b)(11) states that:

. . . .

SBCSC argues that 20 C.F.R. '401.100 and 5 U.S.C. '552a explicitly permit Social Security to release the requested records without Ms. Mason's written consent. This interpretation of the plain language of the cited statute and regulation is logical, but *SBCSC overlooks two regulations cited by Social Security. 20 C.F.R. '401.180 – similar to '401.100 – directly addresses the disclosure of official records and information held by Social Security and specifically explains the Privacy Act's impact on Social Security's policies:*

The Privacy Act allows us to disclose information when we receive an order from a court of competent jurisdiction. However, much of our information is especially sensitive. Participation in social security programs is mandatory, and so people cannot limit what information is given to SSA. When information is used in a court proceeding, it usually becomes part of a public record, and its confidentiality cannot be protected. *Therefore, we treat subpoenas or*

other court orders for information under the rules in paragraph (b) of this section (emphasis supplied).

(b) We generally disclose information in response to a subpoena or other court order if –

(1) Another section of this part would specifically allow the release; or

(2) The Commissioner of SSA is a party to the proceeding; or

(3) The information is necessary for due process in a criminal proceeding. ***In other cases, we try to satisfy the needs of the courts while preserving confidentiality of information.***

'401.180 therefore creates certain circumstances where Social Security will disclose information pursuant to a subpoena or court order. While recognizing the validity of the provision of the Privacy Act which SBCSC relies upon, ***'401.180 adds another hurdle by creating a presumption against disclosure in circumstances other than those enumerated. The second sentence of '401.180(b)(3) does not authorize the release of the records for use in civil cases, but indicates that Social Security will try to meet the dual goals of assisting the court and preserving the confidentiality of the records.*** Although it is difficult to imagine how Social Security's conduct in this case could be viewed as an attempt to satisfy the needs of the court, ***it is equally difficult to read '401.180(b)(3) as giving Social Security employees carte blanche to disclose records – much less mandating such disclosure – in every instance where a court issues an order compelling production and compliance.***

> SBCSC cites [*citation omitted*] for the proposition that "the Social Security Act was not intended to prohibit disclosure for discovery purposes where Court supervision is available." ***The court declines to follow O'Neill, particularly because it makes no reference to 20 C.F.R. '401.180, a regulation that is controlling to the issue before the court.*** Moreover, the issue of disclosure of Social Security records came before the *O'Neill* court in a considerably different posture: the subpoena duces tecum requesting the Social Security records was issued to a private attorney – not to a Social Security official – who happened to be in possession of the records.
>
> ***SBCSC has not shown that it has the right – or that the court has the power – to compel the production of Ms. Mason's Social Security records without her signing a release.*** Conversely, Social Security has provided ample authority to convince the court ***that Social Security's regulations generally do not authorize the release of such records upon order of a court, even a federal court, in the absence of a special circumstance as defined by the statutes and regulations.*** Accordingly, ***the court cannot find by clear and convincing evidence that Social Security is in contempt."*** (Emphasis added). Id. pp. 1097-1098.

Mason, supra, thus clearly indicates the complex interplay of supreme Federal law in the disclosure of records maintained on an individual such as Petitioner by the Social Security Administration. ***Mason,*** supra, makes several extremely important observations, to-wit: (a) a federal employee cannot be compelled to obey a subpoena, even a federal subpoena, that acts against valid

agency regulations; (b) as a general rule – the Social Security Administration does not disclose people's records without their written consent – that is subject to certain exceptions including the Privacy Act, the FOIA and other regulations; (c) the party requesting the records bears the burden to show that release of the records without the written consent of the subject of the records is authorized under applicable law; (d) 20 C.F.R. § 401.180 – similar to § 401.100 – directly addresses the disclosure of official records and information held by Social Security and specifically explains the Privacy Act's impact on Social Security's policies; (e) the second sentence of § 401.180(b)(3) does not authorize the release of the records for use in civil cases, but indicates that Social Security will try to meet the dual goals of assisting the court and preserving the confidentiality of the records; (f) § 401.180(b)(3) does not give the Social Security Administration carte blanche to disclose records – much less mandate such disclosure – in every instance where a court issues an order compelling production and compliance; and, (g) the Social Security Administration's regulations generally do not authorize the release of such records upon order of a court, even a federal court, in the absence of a special circumstance as defined by the statutes and regulations. ***Parenthetically, these controlling provisions of supreme Federal law cannot be circumvented by a state court using the simple, but clearly unauthorized, expediency of ordering an individual to sign written authorizations that will allow an opposing party to obtain said individual's records from the Social Security Administration.***

In the workers' compensation proceeding *sub judice*, the Respondent Hearing Officer did not conduct any hearing as required by federal law prior to issuance of her complained of decision. Further, the Respondent Hearing officer entered an order that is clearly not available under governing federal law, i.e., an order that Petitioner execute a written authorization in favor of Defendant that purports to authorize Defendant to obtain records maintained on Petitioner by the Social Security Administration. Certainly, if The Congress had wished to authorize such orders, it would have done so explicitly in 5 U.S.C. § 552a(b).

This Court's decision in ***Theodore***, supra, apparently orders a claimant in a workers' compensation proceeding to execute an authorization allowing the defendant to obtain her social security disability records. Petitioner respectfully submits that ***Theodore***, supra, and its interpretation of LSA-C.C.P. Art. 1461, conflicts with supreme Federal law; thus, ***Theodore***, supra, should be overruled. See U.S.C. Const. Art. VI, cl. 2; ***California Federal Savings & Loan Association v. Guerra***, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d. 613 (1987); and, ***California Coastal Commission v. Granite Rock Company***, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987).

To summarize. In ordering Petitioner to sign a written authorization in favor of Defendant that purports to allow Defendant to obtain records maintained on Petitioner by the Social Security Administration, the Respondent Hearing Officer violated supreme Federal law and granted relief that is clearly not available under said law.

CONCLUSION

The Respondent Hearing Officer's complained of decision that Petitioner sign a written authorization purporting to allow Defendant to obtain records maintained on Petitioner by the Social Security Administration issued in violation of the clear mandates of supreme Federal law. In particular, the Privacy Act of 1974 (5 U.S.C. § 552a), 42 U.S.C. § 1306(a) and 20 CFR, § 401(C) do not authorize any court or Hearing Officer under any circumstance to issue such an order. Rather, 5 U.S.C. § 552a(b)(11), and the federal jurisprudence interpreting that statute, provide the exclusive method by which Defendant may obtain Petitioner records maintained by the Social Security Administration in the workers' compensation proceeding *sub judice*. In summary, the Respondent Hearing Officer may issue an order to the Social Security Administration under 5 U.S.C. § 552a(b)(11) that Petitioner's records maintained by said agency be disclosed to Defendant only after conducting a hearing whereat (a) the relevancy of the information in question is established, (b) a substantive balancing of the competing interests of need for disclosure versus the harm that might be caused by disclosure is performed and (c) consideration is given to the use of a protective order, an in camera inspection, etc., to protect the privacy rights of Petitioner.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court peremptorily issue a writ under its supervisory jurisdiction, reversing the Respondent Hearing Officer's erroneous decision signed on September 10, 1998, that orders Petitioner to sign a written authorization in favor of Defendant, Cajun Bag Company, purporting to

allow Defendant to obtain records maintained on Petitioner by the Social Security Administration.

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By: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS (4678)

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned notary public, personally came and appeared Mr. Lawrence N. Curtis, who, after being duly sworn by me, did depose and say that: Affiant is counsel of record for Plaintiff-Relator, Edward Weekly; copies of this writ application have been supplied to the Respondent Hearing Officer, the Honorable Court of Appeal, Third Circuit, and to opposing counsel by United States Mail, postage prepaid and properly addressed; and, all of the allegations made in the application are true and correct to the best of affiant's knowledge, information and belief.

The attorney of record for Defendant-Respondent, Cajun Bag Company, is:

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/s/ Lawrence N. Curtis
LAWRENCE N. CURTIS

SWORN TO AND SUBSCRIBE BEFORE ME on this 3rd day of November, 1998.

/s/ Darlene S. Thibodeaux
NOTARY PUBLIC

DARLENE S. THIBODEAUX,
NOTARY PUBLIC
In And For The State Of Louisiana
My Commission is For Life

706 So.2d 441

97-2521 La. 12/19/97

Barbara THEODORE

v.

HOLI TEMPORARY SERVICE, INC.

No. 97-CC-2521.

Supreme Court of Louisiana.

Dec. 19, 1997.

In re Holi Temporary Serv., Inc.; – Defendant(s); applying for supervisory and/or remedial writ; Office of Worker's Compensation, Dist. 8, No. 97-00912; to the Court of Appeal, Fourth Circuit, No. 97CW-1971.

Granted. Judgment of the hearing officer is vacated and set aside. The motion to compel is granted, and claimant is ordered to execute an authorization allowing relator to obtain her Social Security disability records. See La. Code Civ.P. art. 1461. Case remanded to the Office of Workers' Compensation for further proceedings.

KNOLL, J., not on panel.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED IN THE CASE

(A). CONSTITUTIONAL PROVISION

The pertinent constitutional provision involved in this case is U.S.C. Art. VI, cl. 2:

> *"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;* and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."* (Emphasis added.)

(B). STATUTES

The pertinent statutes involved in this case are:

(1). 42 U.S.C. ' 1306(a):

" ' 1306. Disclosure of information in possession of Social Security Administration or Department of Health and Human Services

(a) *Disclosure prohibited*; exceptions

(1) *No disclosure* of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. §§ 1001 et seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code of 1939, or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by

the Commissioner of Internal Revenue, or *of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by any officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.* Any person who shall violate any provision of this section shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 for each occurrence of a violation, or by imprisonment not exceeding 5 years, or both.

(2) For purposes of this subsection and subsection (b) of this section, *the term "applicable agency" means* –

(A) *the Social Security Administration, with respect to matter transmitted to or obtained by such Administration or matter disclosed by such Administration,* or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department." (Emphasis added.)

(2). 5 U.S.C. ' 552(b)(3) and (b)(6), which provides:

" ' 552. Public information; agency rules, opinions, orders, records, and proceedings

* * *

(b) *This section does not apply to matters that are* –

* * *

(3) *specifically exempted from disclosure by statute* (other than section 552b of this title), *provided that such statute* (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) *establishes particular criteria for withholding or refers to particular types of matters to be withheld;*

* * *

(6) *personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;* . . . ". (Emphasis added.)

(3). 5 U.S.C. '552a(b) and 552a(b)(11), which provides:

"' **552a. Records maintained on individuals**

* * *

(b) Conditions of disclosure. – *No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains,* unless disclosure of the record would be –

* * *

(11) ***pursuant to the order of a court of competent jurisdiction;*** or . . . ". (Emphasis added.)

(C). REGULATIONS

The pertinent regulations involved in this case are:

(1). 20 C.F.R. ' 401.100(a), which provides:

" ' 401.100 Disclosure of records with the consent of the subject of the record.

(a) Except as permitted by the Privacy Act and the regulations in this chapter, or if required by the FOIA, ***we will not disclose your record without your written consent.*** The consent must specify the individual, organizational unit or class of individuals or organizational units to whom the record may be disclosed, which record may be disclosed and, where applicable, during which time frame the record may be disclosed (e.g., during the school year, while the subject individual is out of the country, whenever the subject individual is receiving specific services). We will not honor a blanket consent to disclose all your records to unspecified individuals or organizational units. We will verify your identity and, where applicable (e.g., where you consent to disclosure of a record to a specific individual), the identity of the individual to whom the record is to be disclosed." (Emphasis added.)

(2). 20 C.F.R. ' 401.115, which provides:

" ' 401.115 Disclosure of personal information in program records without the consent of the subject of the record.

This section describes how various laws control the disclosure or confidentiality of personal information which we keep. We must consider these laws in the following order:

(a) Some laws require us to disclose information (' 401.120); some laws require us to withhold information (' 401.125). These laws control whenever they apply.

(b) If no law of this type applies in a given case, then we must look to FOIA principles. See ' 401.130.

(c) ***When FOIA principles do not require disclosure, we may disclose information if both the Privacy Act and section 1106 of the Social Security Act permit the disclosure.***" (Emphasis added.)

(3). 20 C.F.R. ' 401.80, which provides:

"' **401.180 Courts.**

(a) General. ***The Privacy Act allows us to disclose information when we receive an order from a court of competent jurisdiction.*** However, much of our information is especially sensitive. Participation in social security programs is mandatory, and so people cannot limit what information is given to SSA. When information is used in a court proceeding, it usually becomes part of a public record, and its confidentiality cannot be protected. Therefore, ***we treat subpoenas or other court orders for information under the rules in paragraph (b) of this section.***

(b) Subpoena. ***We generally disclose information in response to a subpoena or other court order if –***

(1) Another section of this part would specifically allow the release; or

(2) The Commissioner of SSA is a party to the proceeding; or

(3) The information is necessary for due process in a criminal proceeding. ***In other cases, we try to satisfy the needs of courts while preserving the confidentiality of information.***" (Emphasis added.)

(4). 45 C.F.R. ' 2.5, which provides:

"' **2.5 Subponeas duces tecum.**

(a) ***Subpoenas duces tecum for records of the Department of Health and Human Services shall be deemed a request for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure established in 45 CFR Part 5.***

(b) ***Whenever a subpoena duces tecum, in appropriate form, has been lawfully served upon a Department of Health and Human Services' employee commanding the production of any record,*** such employee, after consultation with the Office of the General Counsel, ***shall appear in response thereto, respectfully decline to produce the record(s) on the ground that it is prohibited by this section, and state that the production of the record(s) involved will be handled by the procedures and disclosure rules established in 45 CFR Part 5.***" (Emphasis added.)

(5). 45 C.F.R. ' 5.3, which provides:

"' **5.3 Scope.**

These rules apply to all components of the Department. Some units may establish additional rules because of unique program requirements, but such rules must be consistent with these rules and must have the concurrence of the Assistant Secretary for Public Affairs. Existing implementing rules remain in effect to the extent that they are consistent with the new Departmental regulation. If additional rules are issued, they will be published in the Federal Register, and you may get copies from our Freedom of information Officers." (Emphasis added.)

(6). 45 C.F.R. ' 5.64, which provides:

"' **5.64 Exemption three: Records exempted by other statutes.**

We are not required to release records if another statute specifically allows us to withhold them. We may use another statute to justify withholding only if it absolutely prohibits disclosure or ***if it sets forth criteria to guide our decision on releasing or identifies particular types of material to be withheld."*** (Emphasis added.)

(7). 45 C.F.R. ' 5.67(a) and (c), which provides:

"' **5.67 Exemption six: Clearly unwarranted invasion of personal privacy.**

(a) Documents affected. ***We may withhold records about individuals if disclosure would constitute a clearly unwarranted invasion of their personal privacy.***

* * *

(c) Examples. ***Some of the information that we frequently withhold under Exemption Six is:*** Home addresses, ages, and minority group status of our employees or former employees; social security numbers; medical information about individuals participating in clinical research studies; names and addresses of individual beneficiaries of our programs, or benefits such individuals receive; ***earning records, claim files, and other personal information maintained by the Social Security Administration,*** the Public Health Service, and the Health Care Financing Administration." (Emphasis added.)

(8). 45 C.F.R. ' 5b.9(a)(1) and (b)(2) and (11), which provides:

"' **5b.9 Disclosure of records.**

(a) ***Consent to disclosure by a subject individual.***

(1) Except as provided in paragraph (b) of this section authorizing disclosures of records without consent, ***no disclosure of a record will be made without the consent of the subject individual.*** In each case the consent, whether obtained from the subject individual at the request of the Department or whether provided to the Department ***by the subject individual on his own initiative,*** shall be in writing. The consent shall specify the individual, organizational unit or class of individuals or organizational units to whom the record may be disclosed, which record may be disclosed and, where applicable, during which time frame the record may be disclosed (*e.g.*, during the school year,

while the subject individual is out of the country, whenever the subject individual is receiving specific services). A blanket consent to disclose all of a subject individual's records to unspecified individuals or organizational units will not be honored. The subject individual's identity and, where applicable (*e.g.*, where a subject individual gives consent to disclosure of a record to a specific individual), the identity of the individual to whom the record is to be disclosed shall be verified.

* * *

(b) Disclosures without the consent of the subject individual. The disclosures listed in this paragraph may be made without the consent of the subject individual. ***Such disclosures are:***

* * *

(2) ***Required*** to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

* * *

(11) ***Pursuant to the order of a court of competent jurisdiction.***" (Emphasis added.)